89-758

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

BROTHERHOOD OF RAILROAD SIGNALMEN, AFL-CIO, *et al.*,

Petitioners,

v.

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED *

The court of appeals ruled that the Railway Labor Act (RLA) overrides the Norris-LaGuardia Act and grants the federal courts authority to enjoin sympathetic refusals to cross a picket line set up by employees engaged in a lawful primary strike where the applicable collective bargaining agreement arguably prohibits such sympathy strikes. The questions presented are:

(1) Whether, in the industries governed by the RLA, the federal courts have, in particular, the authority to enter *status quo* injunctions, pending arbitration, against sympathy strikes alleged to be in breach of the applicable collective bargaining agreement.

(2) Whether the federal courts have, in general, the authority to enter *status quo* injunctions, pending arbitration, against actions alleged to be in breach of an RLA collective bargaining agreement.

(3) If the foregoing questions are answered in the affirmative, whether an employer seeking an injunction against sympathetic refusals to cross a picket line set up by employees engaged in a lawful RLA strike must make a showing (a) that the applicable collective bargaining agreement constitutes a clear and unmistakable waiver of the right to engage in sympathy strikes and (b) that a consideration of all the equities—including those of the employees engaged in the lawful primary strike—requires the issuance of an injunction.

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* The questions presented in this petition are identical to those presented in the petition for certiorari filed on September 13, 1989, in *International Association of Machinists and Aerospace Workers, AFL-CIO v. The Long Island Railroad Co.*, No. 89-427.

LIST OF PARTIES

A complete list of the parties in the proceedings below is set out in Appendix G. App. 53a.

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No.

BROTHERHOOD OF RAILROAD SIGNALMEN, AFL-CIO, *et al.*,

Petitioners,

v.

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners Brotherhood of Railroad Signalmen, *et al.*, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in *Southeastern Pennsylvania Transportation Authority v. Brotherhood of Railroad Signalmen, et al.* (3d Cir. No. 89-1174) on August 14, 1989.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 882 F.2d 778 and is printed as Appendix A hereto. App. 1a. The memorandum and order and the preliminary injunction issued by the United States District Court for the Eastern District of Pennsylvania are reported at 708 F. Supp. 659 and are printed as Appendix B hereto. App. 27a.

JURISDICTION

The judgment of the court of appeals was entered on August 14, 1989. App. 47a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

Section 1 of the Norris-LaGuardia Act provides:

> No court of the United States, as defined in this chapter, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter.

29 U.S.C. § 101.

Section 4 of the Norris-LaGuardia Act provides in part:

> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:
>
> (a) Ceasing or refusing to perform any work or to remain in any relation of employment; . . .
>
> (e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;
>
> (f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;
>
> (g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title.

29 U.S.C. § 104 (a), (e), (f), (g), (h), (i).

STATEMENT OF THE CASE

This case, like *International Association of Machinists and Aerospace Workers, AFL-CIO v. The Long Island Railroad Co.*, 874 F.2d 901 (2d Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. 3172 (U.S. Sept. 13, 1989) (No. 89-427), arises out of the strike of the International Association of Machinists and Aerospace Workers ("IAM") against Eastern Air Lines ("Eastern"). In each case the lower courts enjoined petitioner unions from honoring IAM picket lines. *IAM v. Long Island Railroad* involves labor contracts that do not contain "no strike" clauses; in this case, seven of the eight labor contracts at issue contain narrow "no strike" clauses which on their face do not prohibit petitioner unions from honoring picket lines of IAM-represented Eastern employees.[1]

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[1] The ten unions involved in this case are the Brotherhood of Railroad Signalmen (BRS), the United Transportation Union (UTU), the Brotherhood of Locomotive Engineers (BLE), the Brotherhood of Maintenance of Way Employes (BMWE), two divisions of the Transportation Communications Union, formerly known as the Brotherhood of Railway and Airline Clerks (BRAC), the International Brotherhood of Electrical Workers (IBEW), the Brotherhood Railway Carmen (BRC), the International Association of Machinists & Aerospace Workers (IAM), the Transport Workers Union (TWU), and the Sheet Metal Workers International Association (SMWIA).

There are eight agreements at issue. The BRS, UTU, BLE, BMWE, the two divisions of BRAC, and the IBEW each have separate agreements with SEPTA. BRC, TWU, IAM and SMWIA have a joint agreement with SEPTA.

At 12:01 a.m. on Saturday, March 4, 1989, employees represented by the IAM began a lawful strike against Eastern. The Eastern strikers' plan, as SEPTA had been informed at least as early as February 24, *see* J.A. 81 [2], rested heavily on the full-fledged use of the economic weapon of secondary picketing, appealing to other organized employees and seeking their aid through sympathy strikes. *See Burlington Northern v. Maintenance Employes*, 481 U.S. 429 (1987) (upholding the legality of such picketing).

Seven of the eight agreements between SEPTA and the ten rail unions which represent employees in SEPTA's Regional Rail Division contain "No Strike" clauses which provide that:

> With respect to a strike by the Union, the provisions of the Railway Labor Act apply.

App. 29a.[3] The "No Strike" clause of the remaining contract, between SEPTA and the IBEW, provides that the IBEW shall not:

> in any way, directly or indirectly authorize, cause, assist, encourage, participate in, ratify or condone any strike, sit-down, sit-in, slow-down, sympathy strike, cessation or stoppage of work, boycott, picketing, or other interference with or interruption of work at any of SEPTA's operations . . . .

App. 29a. Each of the agreements—except the one with the IBEW—includes a side letter agreement which, as the district court found, "refers to the no strike section of the main agreement and prohibits each union from engaging in 'any sympathy strike . . . in support of any job action or picketing by any SEPTA non-commuter rail em-

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[2] Citations to "J.A. ——" are to the Joint Appendix filed in the court of appeals.

[3] *See* J.A. 39 (BRS); J.A. 44 (UTU); J.A. 48 (BLE); J.A. 53 (BMWE); J.A. 58 (BRAC—T-C Div.); J.A. 62 (BRAC—Clerks); J.A. 76 (BRC/TWU/IAM/SMWIA).

ployees.'" App. 29a-30a.[4] Three of these side letter agreements contain policy statements of the union signatories which set forth the union's policy of honoring the picket lines of other rail unions.[5] It is undisputed that IAM-represented employees of Eastern Air Lines are not "SEPTA non-commuter rail employees." J.A. 168.

On Friday, March 3, 1989, SEPTA sought a temporary restraining order enjoining all of its Regional Rail Division unions from honoring IAM picket lines. J.A. 20-29. A temporary restraining order was issued that night. *Id.* SEPTA's motion for a preliminary injunction was granted on March 8, 1989. App. 41a.[6] Five months later the Third Circuit affirmed. That court acknowledged that "[i]n the end, the unions' arguments might carry the day in arbitration." App. 18a.[7] However, the court below reasoned that SEPTA's position that the collective bargaining agreements prohibited the unions from honoring IAM picket lines "is not so frivolous or insubstantial as to lack arguable justification." App. 18a. On that ground, and in conflict with decisions of the Eleventh and Fifth Circuits, the Third Circuit concluded that an

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[4] *See also* J.A. 40-41 (BRS); J.A. 45 (UTU); J.A. 50 (BLE); J.A. 54 (BMWE); J.A. 55, 61 (BRAC); J.A. 79-80 (BRC/TWU/IAM/SMWIA).

[5] *See* J.A. 41 (BRS); J.A. 45 (UTU); J.A. 50-51 (BLE). The side letter agreements between SEPTA and BMWE, the two BRAC divisions, and BRC, TWU, IAM and SMWIA do not contain any "policy statement" language. *See* J.A. 52-80.

[6] On March 9, 1989, the court of appeals denied the unions' motion for a stay of the preliminary injunction pending appeal. App. 48a. On March 14, 1989, Justice Brennan, in his capacity as Circuit Justice, denied petitioners' application to vacate the preliminary injunction. App. 49a.

[7] *Cf. IAM v. Long Island Railroad*, 874 F.2d at 909 (affirming issuance of preliminary injunction barring honoring of IAM picket lines even though the absence of no strike provision in contracts "may decrease the Railroads' likelihood of prevailing on the underlying dispute.")

RLA minor dispute was presented. *See id.* The court of appeals therefore assumed, in conflict with decisions of the First and D.C. Circuits, that the district court had jurisdiction to enter a *status quo* injunction pending arbitration. *See* App. 19a.

REASONS FOR GRANTING THE WRIT

This *certiorari* petition—like the pending petition in *IAM v. Long Island Railroad*, No. 89-427 (filed Sept. 13, 1989)—grows out of a bitter and protracted labor dispute at Eastern Air Lines and raises an absolutely fundamental question of federal labor policy: whether the federal courts' equity powers should be directed against concerted refusals to work that do not arise out of the employees' dispute with their immediate employer but out of a refusal to cross a picket line set up by another group of organized employees in the latter's effort to obtain a new collective bargaining agreement.

The *IAM v. Long Island Railroad certiorari* petition sets out in detail the reasons why this question—which is open in this Court—goes to the essence of a free collective bargaining system. That petition also enumerates the multiple conflicts in the decisions of the courts of appeals that have developed as the lower courts have grappled with this question and the resulting disarray in the applicable law.[8] For the reasons set forth in the *IAM v. Long Island Railroad* petition, we request that both petitions be granted and set down for argument in tandem. So as not to burden the Court with a duplicative

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[8] The *IAM v. Long Island Railroad certiorari* petition identifies two basic conflicts among the courts of appeals on important labor law questions. The first question is whether the federal courts have authority to enjoin Railway Labor Act sympathy strikes. *See* Pet. at 8-12. The second is whether, as a more general matter, the federal courts have jurisdiction to enter *status quo* injunctions, pending arbitration, against actions alleged to be in breach of an RLA collective bargaining agreement. *See* Pet. at 12-13.

presentation, we incorporate pages 4-16 of the *IAM v. Long Island Railroad* petition by reference and add only a few words about the particulars of this case.[9]

1. The collective bargaining agreements in *IAM v. Long Island Railroad* do not contain "no strike" clauses. This case, as we noted in the statment, involves eight labor contracts: One contains a broad "no strike" clause. *See* App. 29a. The seven other contracts include side letter agreements which, as the district court found,

> contain substantially similar language which refers to the no strike section of the main agreement and prohibits each union from engaging in 'any sympathy strike . . . in support of any job action or picketing by any SEPTA non-commuter rail employees.'

App. 29a-30a. And SEPTA's chief labor negotiator had no choice but to admit that IAM-represented Eastern employees are not "SEPTA non-commuter rail employees". J.A. 168.

Since the claim for injunctive relief in both this case and *IAM v. Long Island Railroad* is a *contract based claim*, the logic of the situation is that these manifold differences in the contractual "no strike" clauses at issue should result in differences in result. Neither the Second Circuit nor the Third Circuit felt itself bound by any such logic.

The Second Circuit enjoined the rail unions from honoring picket lines of IAM-represented Eastern employees even in the absence of "no strike" clauses. And the court below held that SEPTA's argument that *all* of the contracts prohibit the honoring of IAM secondary picket lines "is not so frivolous or insubstantial as to lack arguable justification." App. 18a. That court reached this result—which it also found to be a sufficient basis for an injunction pending arbitration—even though

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[9] Along with this petition respondent SEPTA is simultaneously being served with copies of the petition filed in *IAM v. Long Island Railroad.*

IAM-represented Eastern employees are not "SEPTA non-commuter rail employees"; even though only one of the contracts or side letter agreements, the one with the IBEW, on its face prohibits the union conduct which is the subject of the injunction; even though SEPTA's broad "no strike" agreements with the IBEW and with unions representing other SEPTA employees clearly demonstrate that SEPTA is a sophisticated employer which has successfully negotiated prohibitions on the honoring of picket lines with some unions;[10] and even though the extra-contractual union-specific "policy statement" language which was the foundation of the court of appeals' holding, *see* App. 17a-18a, appears in only two of the seven side letter agreements.[11] In short, it made no difference to the court of appeals what the applicable agreements said—the honoring of picket lines was enjoined.

In sum, the decision below, like the *IAM v. Long Island Railroad* decision, is in everything but name an across-the-board proscription on sympathy strikes in the railroad and airline industries, regardless of the terms of the applicable labor agreements. The court of appeals held, in essence, that where the RLA applies a union that refuses to agree to waive its right to honor picket lines (here nine of the ten unions) will be treated in the same way as a union that agrees to do so (here the IBEW): Both will be enjoined from honoring a lawful picket line.

2. The Third Circuit also followed the Second Circuit in equating the honoring of picket lines with participation

[10] *See* J.A. 97 (SEPTA-TWU contract covering city-side employees provides that "[d]uring the term of this Agreement, no employe shall participate in any strike, slow-down, sit-down, stay-in or other stoppage of work.").

[11] The "policy statement" language in the BRS, UTU and BLE agreements in fact reaffirms the general policy of each of these unions to honor picket lines despite its agreement to cross the picket lines of "SEPTA non-commuter rail employes". *See* App. 6a (quoting BRS policy statement). *See also* J.A. 41, 45-46, 50-51.

in a primary strike over an arbitrable contract dispute. In the view of the court of appeals, the only employee interest at stake here is that of the petitioner rail unions. That court acknowledged that "[t]he impact of any secondary activity into which the Eastern employees might enter will, of course, be diminished if the members of the unions cannot honor those picket lines." App. 20a.[12] The court below also recognized that the Eastern employees might not exercise their right to establish secondary picket lines because the honoring of those picket lines had been enjoined. *See* App. 20a & n.8. Nevertheless, the court of appeals gave *no weight whatsoever* to the rights of the Eastern employees. "It must be remembered," that court said, "that the rights which this Court is called on to determine are those of the [SEPTA] unions and not those of the Eastern unions. . . . [H]aving found that a minor dispute exists, the courts have the authority under [*Trainmen v. Chicago River & I.R. Co.*, 353 U.S. 30 (1957)] to maintain the integrity of the arbitration process by enjoining the [SEPTA] unions from striking prior to the completion of the arbitration proceedings." App. 21a.

The facile equation of this case with a *Chicago River* case totally ignores the true interests at stake. Under *Chicago River* the injunction against self-help is both in form and *in substance* directed at a party to a contract who has no right to engage in self-help over a contract interpretation dispute and who does have a right to an arbitral resolution of its breach of contract claim. Here, by contrast, while in form the injunction is against the petitioner unions, which are parties to collective bargaining agreements with the respondent railroad, in substance the injunction is against *the employees of Eastern Air Lines represented by the IAM*, who have exhausted

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[12] *Cf. IAM v. Long Island Railroad*, 874 F.2d at 910 ("We agree that it is somewhat anomalous that secondary picketing is allowed by *Burlington Northern*, but considerably undercut in its effectiveness by the type of injunction entered here.")

the Railway Labor Act collective bargaining procedures and who have a right to engage in meaningful self-help.

The court of appeals compounded its error by holding that it is sufficient for a carrier seeking a *status quo* injunction to show that it is "arguable" that the applicable collective bargaining agreement may be read as a waiver of the employees' right to honor a lawful picket line. *See* App. 10a (citing *Consolidated Rail Corp. v. RLEA*, 109 S.Ct. 2477 (1989)). The court below reasoned that "[a] requirement that SEPTA prove that the collective bargaining agreements clearly and unmistakably indicate that the unions waived their right to engage in a sympathy strike is fundamentally at odds" with the standard articulated by this Court for determining whether an RLA minor dispute is presented. App. 12a.

This reading of the RLA exalts form over substance. In the RLA context as in the National Labor Relations Act context, the correct rule is that a contractual waiver of this basic statutory right "must be 'clear and unmistakable'." *Local Union 1395, IBEW v. NLRB*, 797 F.2d 1027, 1029 (D.C. Cir. 1986) (quoting *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983)). Any other rule permits the courts to issue injunctions that in practical terms negate the basic statutory right to strike and to picket for a new collective bargaining agreement merely upon finding that the position of one party is "arguable." And permitting such injunctions turns the RLA's minor dispute procedures into the means for undermining the Act's major dispute procedures.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted and this case should be set down for argument in tandem with *IAM v. Long Island Railroad*, No. 89-427.

Respectfully submitted,

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APPENDIX A

Filed August 14, 1989

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-1174

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY

v.

BROTHERHOOD OF RAILROAD SIGNALMEN, *et al.*

Brotherhood of Railway Signalmen; Ronald E. McKenzie, General Chairman, Brotherhood of Railway Signalmen; V.M. Speakman, President, Brotherhood of Railway Signalmen; W. Keebler, Local Chairman, Brotherhood of Railway Signalmen; Brotherhood of Locomotive Engineers; Larry McFather, President, Brotherhood of Locomotive Engineers; R.W. Goodwin, General Chairman, Brotherhood of Locomotive Engineers; T.J. Dorricott, Vice Chairman, Brotherhood of Locomotive Engineers; Geoffrey Zeh, President, Brotherhood of Maintenance of Way Employees; William Larve, Vice-President, Brotherhood of Maintenance of Way Employees; Leonard W. Allen, General Chairman, Brotherhood of Maintenance of Way Employees; A. Benz, Local Chairman, Brotherhood of Maintenance of Way Employees; R.I. Kilroy, International President, Transportation Communications Union; Howard Rudolph, General Chairman, Transportation Communications Union; Lance Rogers, District Chairman; C.E. Wheeler, President, Brotherhood of Railway Carmen; A.J. Titus, Local Chairman, Brotherhood of Railway Carmen; James J. Parry, General Chairman,

Brotherhood of Railway Carmen; Edward P. McEntee, International Vice-President, International Brotherhood of Electrical Workers; Harvey Lindemuth, General Chairman; International Brotherhood of Electrical Workers; F.A. Hardin, President; C.P. Jones, Chairman, United Transportation Union; D.M. Thompson, Local Chairman, United Transportation Union; J.E. Burns, President, International Association of Machinists; International Association of Machinists; Charles C. Arthur, Jr., General Chairman, International Association of Machinists; Keith Bean, Local Chairman, International Association of Machinists; Sheetmetal Workers International Association; Richard King, International Representative, Sheetmetal Workers International Association; R.P. Branson, General Chairman, Sheetmetal Workers International Association; R.F. Schembers, Local Chairman, Sheetmetal Workers International Association; Transportation Workers Union of America; Charles H. Little, President, Transportation Workers Union of America;

Appellants

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 89-1604)

Argued April 18, 1989
BEFORE: SEITZ,* SLOVITER and
GREENBERG, *Circuit Judges.*

(Filed: August 14, 1989)

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* Since the date of oral argument, Judge Seitz has taken senior status.

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OPINION OF THE COURT

SEITZ, *Circuit Judge.*

Appellants, the Brotherhood of Railroad Signalmen and several other unions (the "unions") representing employees of the Southeastern Pennsylvania Transportation Authority ("SEPTA") Regional Rail Division, appeal from the order of the district court granting SEPTA's motion for a preliminary injunction. The order enjoined the unions' membership from engaging in a sympathy strike with the International Association of Machinists and Aerospace Workers Union ("IAM" or the "Eastern employees") members who are striking against Eastern Airlines ("Eastern") and directed the parties to arbitration. The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1337. This Court has jurisdiction pursuant to 28 U.S.C. § 1292(a)(1).

BACKGROUND

SEPTA is divided into four divisions: the Regional Rail Division; the City Transit Division; the Red Arrow Division; and the Frontier Division. The Regional Rail Division, whose unions are the subject of the instant dispute, makes in excess of 90,000 passenger trips a day in the Counties of Philadelphia, Bucks, Chester, Delaware and Montgomery in Pennsylvania.

At midnight, on March 4, 1989, IAM began a strike against Eastern. The district court found, and it is not challenged, that IAM intends to engage in secondary picketing at SEPTA facilities.[1] We emphasise that SEPTA

[1] Shortly after the strike against Eastern began, William Winpisinger, International President of the IAM, dispatched a telegram to the National Railway Labor Conference. This telegram provided: "In the Railroad Industry, we are presently contemplat-

did not dispute at the preliminary hearing, and does not dispute on appeal, that IAM members have the right to engage in secondary picketing at SEPTA facilities. SEPTA, however, contests the rights of its union employees to honor any IAM secondary picket line.

The dispute between SEPTA and the unions emerges from the parties' understanding of their collective bargaining agreements, including certain "side agreements" and the bargaining process leading up to the signing of the collective bargaining agreements. SEPTA believes that, all things considered, the collective bargaining agreements are properly read to prohibit the unions from honoring any secondary picket lines set up by IAM members. Not surprisingly, the unions take the opposite position.

Each of the collective bargaining agreements between SEPTA and the unions contains an arbitration provision. Moreover, each of these agreements also contains a "no-strike" provision. The no-strike provision in the body of each of the collective bargaining agreements, except for the agreement between SEPTA and the International Brotherhood of Electrical Workers Union ("IBEW"),[2]

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ing establishing secondary picketing on Monday, March 6, 1989, as early in the morning as possible at selected locations on several rail carriers including . . . SEPTA." This telegram also requested the assistance of other labor organizations and their membership by asking that the secondary picket lines not be crossed. In addition, Charles Hopkins, Jr., Chairman of the National Railway Labor Conference, by letter dated March 2, 1989, to "MEMBER ROADS and OTHER INTERESTED RAILROADS," stated that "secondary boycotts of railroads are likely."

[2] The collective bargaining agreement between SEPTA and the IBEW is different from the rest, providing in pertinent part: "For the duration of the Agreement, the Union, its officers, agents, representatives, and members shall not in any way directly or indirectly authorize, cause, assist, encourage, participate in, ratify or condone any strike, sit-down, sit-in, slow-down, [or] sympathy strike . . . at any of SEPTA's operations or the operations of any customer of SEPTA." *See* footnote 5.

provides substantially as follows: with respect to any strike by the Union, the provisions of the Railway Labor Act shall apply. In addition, except for the IBEW agreement, each of the agreements has attached to it a "side letter" agreement, the validity of which is not challenged by the unions for the purposes of this appeal. These side letter agreements are all substantially the same. Each refers to the no-strike provision in the relevant collective bargaining agreement and prohibits the signatory union from engaging in any "sympathy strike . . . in support of any job action of picketing by any SEPTA non-commuter rail employes."

The text of several of the side letter agreements states that the side letter agreements are subject to a "policy statement" of the signatory union. The Brotherhood of Railway Signalmen ("Signalmen") makes its side letter agreement subject to the following policy:

> It is the policy of the Brotherhood of Railway Signalmen to support its members in declining to work when another railroad labor organization is on strike. When a strike exists a member should decline to work until pickets have been removed, and the strike is over. It is the further policy of the Brotherhood of Railway Signalmen that the right to decline to work during the strike of another railroad labor organization is a part of the rights of railroad employees guaranteed by the Constitution of the United States and the Railway Labor Act. The Brotherhood of Railway Signalmen will support its members in the free exercise of these rights.

The policy statement of the United Transportation Union ("UTU") provides that "[w]hen a strike of any other nationally recognized labor organization is in effect and danger to the safety of our members exists in or about the area affected by the strike, and/or if there exists any substantial present or potential threat of danger to the members enroute to or from their work, and/

or to the members' families, it is the policy of the United Transportation Union to support its members in declining to enter the territory directly affected." The policy statement of the Brotherhood of Locomotive Engineers provides that "[i]t is the policy of the B. of L.E. that it will support and, if necessary, place the full power of the B. of L.E., behind the members of the B. of L.E., who, because of fear of hazard or injuries to themselves or families or damage to their personal property decline to cross picket lines, and if such conditions do exist the management of the railroad so affected will be notified by the Local or General Chairman of the B. of L.E."

Based on the language of the collective bargaining agreements, the side-letter agreements, the policy statements, and additional testimony adduced at the preliminary hearing, the district court held that a "minor dispute," *see* 45 U.S.C. §§ 152, Sixth and § 153, First(i), existed between SEPTA and the unions as to whether the unions could engage in a sympathy strike with the Eastern employees. The district court found that (1) the IBEW has, without question, contractually agreed not to engage in any sympathy strike at any SEPTA operations; and (2) the other collective bargaining agreements "could clearly be determined at arbitration . . . to prohibit the defendant unions from honoring with a sympathy strike secondary picketing by *any* unions and not just strikes by 'SEPTA non-commuter rail employees.' "

Having concluded that a minor dispute existed, the district court held that it had jurisdiction to enjoin the unions from striking while the minor dispute was being arbitrated in accordance with the procedures set forth in the Railway Labor Act ("RLA"). The district court then found that SEPTA, in addition to proving that a minor dispute existed, satisfied the other criteria for obtaining preliminary injunctive relief,[3] and enjoined the

[3] There is no challenge on appeal to the district court's findings that the other criteria for granting a preliminary injunction were satisfied.

unions from violating the RLA by, *inter alia*, engaging in a sympathy strike. The district court also directed the "defendant and plaintiff [to] proceed to arbitration under their respective contracts and the RLA minor dispute resolution procedures to resolve their dispute concerning defendant unions' claimed right to honor the . . . [IAM] picket lines." It is the issuance of this preliminary injunction which the unions appeal.

We must review the order of the district court and determine if the district court abused its discretion, committed an obvious error in applying the law, or made a serious mistake in considering the proof in issuing the preliminary injunction at issue. *United Telegraph Workers, AFL-CIO v. Western Union*, 771 F.2d 699, 703 (3d Cir. 1985). An "abuse of discretion is a clear error of judgment, and not simply a different result which can arguably be obtained when applying the law to the facts of the case." *Id.*

II. DISCUSSION

The threshold question is whether the dispute between SEPTA and the unions can be termed a "minor dispute" as that phrase is used in the context of the RLA. 45 U.S.C. § 151 *et seq.* If we find that a minor dispute exists, we must then determine whether the preliminary injunction prohibiting the unions from going on strike was properly issued.

A. *EXISTENCE OF A MINOR DISPUTE*

The RLA, and the concepts that are a part of it, "cannot be appreciated apart from the environment out of which it came and the purposes which it was designed to serve." *Elgin, J. & E. Ry. v. Burley*, 325 U.S. 711, 751 (1945) (Frankfurter, J., dissenting). "In adopting the . . . [RLA], Congress endeavored to bring about stable relationships between labor and management in the most important national industry." *Brotherhood of Ry. Trainmen*

v. Chicago River & Ind. R.R., 353 U.S. 30, 40 (1957). It was the goal of Congress to "prevent, if possible, wasteful strike[s] and [the] interruption of interstate commerce." *Burlington Northern R.R. v. Brotherhood of Maintenance of the Way Employees*, 481 U.S. 429 (1987). To this end, Congress sought to exert as much "pressure toward amicable settlement between the parties" as possible. *Elgin, J & E Ry. v. Burley*, 325 U.S. at 754 (Frankfurter, J., dissenting).

The term "minor dispute," which had its genesis in *Elgin, J & E Ry. v. Burley*, 325 U.S. at 723, is predicated on § 2, Sixth and § 3, First(i) of the RLA. 45 U.S.C. §§ 152, Sixth and 153, First(i). These sections "set forth conference and compulsory arbitration procedures for a dispute arising or growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions." *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 57 U.S.L.W. 4742, 4743 (U.S. June 18, 1989). A minor dispute

> "contemplates the existence of a collective bargaining agreement already concluded or, at any rate, a situation in which no effort is being made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning of proper application of a particular provision [in a collective bargaining agreement] with reference to a specific situation or to an omitted case." *Id.*

While the definition of minor disputes has generally proven elusive, the Supreme Court in *Consolidated Rail* has done a great deal to remove the existing obscurity. The Supreme Court noted that the distinguishing feature of a minor dispute is that the "dispute may be conclusively resolved by interpreting the existing [collective bargaining] agreement." *Id.* While recognizing that this standard might allow a party to utilize the minor dis-

pute resolution procedures by simply pleading that the dispute is resolvable by reference to an existing collective bargaining agreement, the Court noted that courts can exercise some judicial control over the label to be affixed to a dispute. The Court stated:

> "If the disputed action of one of the parties can 'arguably' be justified by the existing agreement or, in somewhat different statement, if the contention that the labor contract sanctions the disputed action is not 'obviously insubstantial', the controversy is a minor dispute within the exclusive province of the National Railroad Adjustment Board." *Id.* at 4744 (quoting *Railway Labor Executives Ass'n v. Consolidated Rail Corp.*, 845 F.2d 1187, 1190 (3d Cir. 1988)).

The burden imposed upon the party asserting that a minor dispute is presented is a "light" one. *Consolidated Rail*, 57 U.S.L.W. at 4747.

The discrete question presently under consideration, therefore, is whether SEPTA met its light burden of showing that the no-strike provisions in the respective collective bargaining agreements, taken in conjunction with the side letter agreements, policy statements and any other evidence of the intent of the parties which may properly be considered, arguably prohibit the unions from engaging in a sympathy strike with the Eastern employees at this point. Before we proceed to the merits of this question, two preliminary matters must be addressed.

1. *Need for Clear and Unmistakable Proof*

First, unions argue that in order for the district court to have found the existence of a minor dispute, it must have found that the unions' collective bargaining agreements "clearly and unmistakably" evidenced that the unions waived their rights to engage in a sympathy strike with the Eastern employees. In support of this proposi-

tion the unions cite this Court's opinion in *Delaware Coca-Cola Bottling Co. v. General Teamster Local 326*, 624 F.2d 1182 (3d Cir. 1980), and its progeny. *See Pacemaker Yacht Co. v. National Labor Relations Board*, 663 F.2d 455 (3d Cir. 1981); *International Brotherhood of Electrical Workers, Local 803, AFL-CIO v. National Labor Relations Board*, 826 F.2d 1283 (3d Cir. 1987).

We cannot agree with the unions that to obtain injunctive relief SEPTA was required to prove before the district court that the unions in their collective bargaining agreements clearly and unmistakably waived their right to engage in sympathy strikes. Initially, it should be noted that each of the cases cited by the unions was decided under the National Labor Relations Act (NLRA) and not the RLA. Moreover, this Court has been unable to uncover a single case in the RLA context in which the standard employed was the "clear and unmistakable" criterion adopted by this Court for use under the NLRA. Indeed, not even the scholarly commentary that has discussed the relative merits of the "clear and unmistakable" standard has indicated that it has any relevance to RLA cases. *See, e.g.*, Note, *Coterminous Interpretation: Limiting Express No-Strike Clause*, 67 Va. L. Rev. 729 (1981); Note, *Express No-Strike Clauses And The Requirement Of Clear And Unmistakable Waiver: A Short Analysis*, 70 Cornell L. Rev. 272 (1985). This alone, however, would not be fatal to unions' contention because the Supreme Court has held that in proper circumstances the courts can borrow principles established under the NLRA for use in the RLA context. *See e.g. Trans World Airlines, Inc. v. Independent Federation of Flight Attendants*, 109 S. Ct. 1225, 1230 (1989).

We find, however, that borrowing the "clear and unmistakable" standard from NLRA precedent is wholly inappropriate in the circumstance of the instant case. In *Consolidated Rail* the Supreme Court, as indicated above, stated that the appropriate standard for deter-

mining whether a minor dispute exists is whether the "disputed action of one of the parties can arguably be justified by the existing agreement." *Consolidated Rail*, 57 U.S.L.W. at 4744. A requirement that SEPTA prove that the collective bargaining agreements clearly and unmistakably indicate that the unions waived their right to engage in a sympathy strike is fundamentally at odds with the standard set forth by the Supreme Court. As such, we conclude that SEPTA need only meet its relatively light burden of proving that the collective bargaining agreements can arguably be read to prohibit the unions from engaging in sympathy strike activity in order to categorize the instant dispute as a "minor" one within the parlance of the RLA.

2. *Use of Parol Evidence*

Second, unions contend that the district court erred in considering parol evidence and urge this Court not to consider such evidence in interpreting the agreements. Specifically, unions argue that the district court violated both general principles of contract interpretation and the parties so-called "zipper clause" in considering the extrinsic proof of intent proffered by SEPTA. We will take up these contentions in turn.

a. *Contract Interpretation*

We find that where a court is called on to interpret a collective bargaining agreement it is generally appropriate for the court to look beyond the face of the collective bargaining agreement. The Supreme Court has declared as much in stating:

> "A collective bargaining agreement is not an ordinary contract for the purchase of goods and services, nor is it governed by the same old common-law concepts which control such private contracts. It is a generalized code to govern a myriad of cases which the draftsman cannot wholly anticipate. The collective agreement covers the whole employment relation-

> ship. It calls into being a new common law—the common law of a particular industry. In order to interpret such an agreement it is necessary to consider the scope of other related collective bargaining agreements, as well as practice, usage and custom pertaining to all such agreements." *Transportation-Transportation-Communication Employees Union v. Union Pacific R.R.*, 385 U.S. 157, 161 (1966) (citations and internal quotations omitted).

Moreover, in *Consolidated Rail* the Supreme Court recently noted that collective bargaining agreements may include implied as well as express terms and that the parties' "practice, usage and custom is of significance in interpreting their agreement" to determine if one of the parties' position is arguably justified. *Consolidated Rail*, 57 U.S.L.W. at 4745. *See also*, R. Gorman, *Basic Text in Labor Law, Unionization and Collective Bargaining*, 541 (1976) ("It is common to treat the collective bargaining agreement as comprised not only of the written and executed document but also of plant customs and industrial practices as well as informal agreements and conversations made at the bargaining table but not reduced to writing."). Finally, several courts of appeals have explicitly recognized that in the context of interpreting collective bargaining agreements it is appropriate to look to parol evidence.[4] *See, e.g., National Labor Rela-*

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[4] While the cited cases were decided under the NLRA they are applicable for use in the RLA context. "The relationships created by a collective bargaining agreement [are to] be defined by application of an evolving federal common law grounded in national labor policy." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211 (1985). As these concerns are common to labor law in general and are not peculiar to the RLA, principles developed in construing collective bargaining agreements in the NLRA context provide relevant and useful guidance. *See Trans Int'l Airlines, Inc. v. International Brotherhood of Teamsters*, 650 F.2d 949, 959 (9th Cir. 1980), *cert. denied* 449 U.S. 1110 (1981).

tions Board v. L.B. Preistler & Sons, Inc., 669 F.2d 355, 365 (5th Cir. 1982); *International Ass'n of Machinists and Aerospace Workers, Lodge No. 1194 v. Sergeant Indus.*, 522 F.2d 280, 282 (6th Cir. 1975); *Tolbert v. Union Carbide Corp.*, 495 F.2d 719, 721 (4th Cir. 1974).

Accordingly, we conclude that it was proper for the district court to use parol evidence in interpreting the collective bargaining agreements in question and such evidence is, therefore, properly considered by this Court. In so stating, we do not intend to imply that such evidence could be used to vary the terms of a collective bargaining agreement.

b. *Zipper Clauses*

The unions also argue that the district court erred by ignoring the "contractual agreement of the parties to disregard parol evidence." The agreements between SEPTA and the unions contained what is known in labor law parlance as "zipper clauses." The zipper clauses in question specified that "[n]o agreement or understanding varying or altering the terms of this Agreement shall be of any validity unless in writing and signed by both the Union and SEPTA." Based on the above quoted language the unions claim that the district court was prohibited from examining parol evidence.

We cannot read the zipper clauses to prohibit the district court from examining parol evidence where the evidence is admitted in aid of understanding the intent of the parties in entering into the agreement or provision in question. Such an inquiry does not contradict the express prohibition of the zipper clause as the court is not "varying" or "altering" the terms of the parties' agreement but is simply interpreting the agreement. Thus, to the extent the district court heard parol evidence in order to discern the arguable intent of the no-strike provisions, the zipper clauses do not apply.

3. *Does a Minor Dispute Exist?*

We now determine whether the district court was correct in deciding that, based on all the relevant evidence, the collective bargaining agreements can be said arguably to prohibit the unions from engaging in a sympathy strike with the Eastern employees. The Supreme Court has explained that a party's position regarding the existence of a minor dispute can be said to be "arguably justified" if it is not "frivolous" or "obviously insubstantial." *Consolidated Rail*, 57 U.S.L.W. at 4747. We emphasize that the court's role is a limited one, as we examine the merits of this dispute only insofar as it is necessary to determine if SEPTA's position is arguably justified.

The unions, which, for the purposes of this subsection, shall exclude the IBEW,[3] contend that the district court erred in determining that the collective bargaining agreements, including the side letter agreements, can be read to prohibit the unions from engaging in a sympathy strike with Eastern employees. The unions contend that these side letter agreements, properly read, only prohibit the unions from engaging in sympathy strikes with other SEPTA non-commuter rail employees.

In rejecting this contention, the district court was particularly persuaded by and accepted the testimony of Mr. Hutchinson who is currently the chief officer of labor negotiations for SEPTA. Hutchinson negotiated the collective bargaining agreements with the unions in his capacity as the Chief Industrial Relations Officer of SEPTA.

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[3] While the district court found that "there is no question that they [the IBEW] . . . contractually agreed not to engage in any sympathy strike at any of SEPTA's operations," it, nevertheless, included the IBEW with the other unions in finding that a minor dispute existed between SEPTA and all the unions and directed all the parties to arbitration. The unions do not argue on appeal that the IBEW is differently situated based solely on the clarity of the particular language of the collective bargaining agreement between the IBEW and SEPTA. We, therefore, do not feel called upon to address such a question gratuitously.

At the preliminary injunction hearing it was noted that the side letter agreements only prohibit the unions from engaging in "any sympathy strike . . . in support of any job action or picketing by any SEPTA non-commuter rail employees." While acknowledging that the plain language of these side letters seems only to prohibit the unions from engaging in sympathy strikes for "SEPTA non-commuter rail employees," Hutchinson testified: "[T]hat's bad language. . . I wrote it. In hindsight, I could have made it tighter, I'm sure. But it meant that they [the unions] would not honor any other picket line including picket lines of SEPTA employees unless they were one of the rail brotherhood of SEPTA." App. at 140. Hutchinson further testified that the no-strike provisions in the unions collective bargaining agreements, taking into account the side letter agreements, were intended to mirror the no-strike provisions of SEPTA's contract with its City Transit Division which clearly prohibits sympathy strikes such as the instant one. The district court stated that "it clearly flies in the face of common sense to conclude that SEPTA would choose to limit sympathy strikes only to situations involving its own noncommuter rail employees."

The unions contend that Hutchinson's statements are insufficient to create an arbitrable controversy. They argue that Hutchinson's testimony does not advance SEPTA's position because the IBEW collective bargaining agreement, negotiated by Hutchinson prior to the other collective bargaining agreements, did in fact mirror the City Transit Divisions broad no-strike provision while the other agreements did not. In this regard Hutchinson testified that while he had the IBEW collective bargaining agreement in hand and desired to have an equally broad no-strike provision in the remaining collective bargaining agreements, "the other ones [unions] said we will not put it in the contract [collective bargaining agreement], we'll put it in a side letter, an explanation of it." Thus, Hutchinson's testimony is

that the body of the collective bargaining agreements taken together with the side-letter agreements was meant to have the same operative effect as the broad no-strike clause in the IBEW collective bargaining agreement.

In addressing the meaning of the side letter agreements to determine if SEPTA's position is arguably justified, this Court will also examine two of the policy statements to which side letter agreements were subject. The policy statement of the UTU provides that UTU members shall not be required to cross picket lines where a "strike of any other nationally recognized labor organization is in effect and danger to the safety of the union members exists in or about the area affected by the strike." The policy statement further provides that "SEPTA non-commuter rail employees are not members of 'any other nationally recognized labor organization.'" Similarly, the policy statement of the Signalmen provides that members of that union can refuse to cross a picket line where another "railroad labor organization" is on strike; SEPTA non-commuter rail employees were specifically designated as not being members of "railroad labor organizations."

These policy statements lend support to SEPTA's position in that it can be argued that they are only necessary if one views the side letter agreements as encompassing more than simply SEPTA non-commuter rail employees. If the side letter agreements are read as extending only to SEPTA non-commuter rail employees and we assume that, as the unions contend, the body of each collective bargaining agreement contains no limitation on the unions' right to engage in sympathy strikes, then the policy statements can be viewed as mere surplusage. It is not implausible to assert that it is only by reading the side-letter agreements as applying more broadly than to SEPTA non-commuter rail employees that these statements have any operative legal impact. Moreover, as SEPTA negotiated each of its sideletter

agreements at the same time, employed essentially the same language in each, and for obvious reasons desired that each have the same legal effect, the understanding of the Signalmen and of the UTU, to the extent that it evidences the intent behind these provisions, can be said to have application to each of the unions.

In the end, the unions' arguments might carry the day in arbitration. Based on all of the evidence, however, we think that SEPTA's position is not so frivolous or insubstantial as to lack arguable justification.[6] We therefore hold that the district court did not abuse its discretion when it held that a minor dispute existed between SEPTA and the unions.[7]

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[6] Because we have reached this conclusion, we need not consider SEPTA's alternate argument that the body of the collective bargaining agreements, in adopting the "substantial alignment" test, *see, e.g., Ashley Drew & Northern Ry. v. United Transport. Union and its Affiliated Local No. 1121*, 625 F.2d 1357 (8th Cir. 1980), should be read to prohibit the unions from engaging in a sympathy strike with the Eastern employees. Without expressing any opinion as to the merits of SEPTA's position, we note that in 1987 the Supreme Court expressly rejected the substantial alignment test in *Burlington Northern R.R. v. Brotherhood of Maintenance of the Way Employees*, 481 U.S. 429 (1987).

[7] Having determined that a minor dispute exists between SEPTA and the appellant unions, we conclude that the unions' position that the instant dispute is neither major nor minor is without merit. We point out that the cases cited by the appellant unions in support of their position are wholly distinguishable. *Pan American World Airways v. Flight Engineers Int'l Ass'n*, 306 F.2d 840 (2d Cir. 1962); *Eastern Airlines, Inc. v. Flight Engineers Int'l Ass'n*, 340 F.2d 104 (5th Cir.), *cert. denied*, 328 U.S. 811 (1965); *Burlington Northern Ry. v. Brotherhood of the Maintenance of the Way Employees*, 793 F.2d 795 (7th Cir. 1986), *aff'd*, 481 U.S. 429 (1987). In none of those cases was the court called on to examine the terms of the collective bargaining agreements in order to assess the propriety of issuing an injunction prohibiting a strike. This places the above cases in stark contrast to the instant case. *See Long Island R.R. v. Int'l Ass'n of Machinists and Aerospace Workers*, 874 F.2d 901, 908 (2d Cir. 1989).

B. *PROPRIETY OF ISSUING AN INJUNCTION*

The final issue to be addressed is whether, given the existence of a minor dispute, the district court abused its discretion in enjoining the unions from striking in sympathy with the Eastern employees. The appropriate starting place for our analysis is with the Supreme Court's decision in *Brotherhood of R.R. Trainmen v. Chicago River & Ind. R.R.*, 353 U.S. 30 (1957). In *Chicago River* the Brotherhood of Railway Signalmen filed 21 grievances with the National Railroad Adjustment Board, all of which were classified as minor disputes. The Brotherhood, rather than await the decision of the arbitrators, decided to strike against the Railroad. The Supreme Court, however, affirming the decision of the Seventh Circuit, held that an injunction could properly issue forbidding the Brotherhood from striking during the pendency of the arbitration. The Supreme Court noted that a "District Court has jurisdiction and power to issue necessary injunctive orders to enforce compliance with the requirements of the Railway Labor Act notwithstanding the provisions of the Norris-LaGuardia Act." *Id.* at 42 (quoting *Brotherhood of R.R. Trainmen v. Howard*, 343 U.S. 768, 774 (1952)). Only recently, the Supreme Court, citing *Chicago River*, declared that a "union may be enjoined from striking when the dispute concerns the interpretation or application of its contract and is therefore subject to compulsory arbitration." *Pittsburgh & Lake Erie R.R. v. Railway Labor Executives Ass'n*, 57 U.S.L.W. 4807, 4813 (U.S. June 20, 1989).

Based on the holding of *Chicago River*, the district court determined that SEPTA was entitled to an injunction prohibiting the unions from striking pending resolution of the minor dispute by arbitration. The unions advance two arguments before this Court in order to avoid the result seemingly dictated by *Chicago River* and reached by the district court. We will address each argument.

1. *Rights Emanating From The Eastern Employees Right To Engage In A Secondary Strike*

First, the unions contend that their right to engage in a sympathy strike emanates from the Eastern employees' rights to engage in a secondary strike of SEPTA. The unions correctly note that the Supreme Court in *Burlington Northern R.R. v. Brotherhood of Maintenance of the Way Employees*, 481 U.S. 429, held that the Railway Labor Act does not bar a union from engaging in secondary activity after the major dispute resolution procedures of the RLA have been exhausted. *Id.* at 1852-54. The unions, using the Supreme Court's holding in *Burlington Northern* as a springboard, assert that the right of the Eastern employees to strike is an empty one without the corresponding right on the part of the unions to honor the Eastern employees' picket lines. Thus, the unions conclude, the right of the Eastern employees to engage in secondary picketing at SEPTA facilities necessarily engenders a right on the part of the unions to honor the picket lines.

The impact of any secondary activity into which the Eastern employees might enter will, of course, be diminished if the members of the unions cannot honor those picket lines. Indeed, it is even likely that the Eastern employees will be discouraged from engaging in any secondary activity at SEPTA facilities. Secondary picketing by Eastern employees at SEPTA facilities might not only place the unions' membership in the uncomfortable position of having to cross a picket line but might actually encourage the unions' members to violate the court's order enjoining them from taking any such action.[8]

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[8] It was represented to this Court at oral argument that IAM has not struck SEPTA facilities to this point for fear of encouraging action on the part of the unions which would violate the injunction of the district court.

The unions' position is analytically flawed. It must be remembered that the rights which this Court is called on to determine are those of the unions and not those of the Eastern unions. The rights of the unions are determined by their respective collective bargaining agreements and must be resolved in accordance with the procedures outlined in the RLA. This requires that the unions submit their dispute with SEPTA to binding arbitration. *See* 45 U.S.C. § 153. Moreover, having found that a minor dispute exists, the courts have the authority under *Chicago River* to maintain the integrity of the arbitration process by enjoining the unions from striking prior to the completion of the arbitration proceedings.

The unions argue that *Burlington Northern* undermines the above analysis. In *Burlington Northern* the Supreme Court recognized that after the expiration of the "virtually endless" major dispute resolution procedures, unions are entitled to engage in broad economic self help including secondary picketing against employers even if they are not substantially aligned with their own. *Burlington Northern R.R. v. Brotherhood of Maintenance of the Way Employees*, 481 U.S. at 452-53. The unions contend that the Supreme Court's opinion suggests that in all cases employees of struck secondary employers must be permitted to honor secondary strikes notwithstanding prohibitions against such activity in their own collective bargaining agreements.

We do not agree with the unions. Such a holding would negate provisions in collective bargaining agreements that clearly prohibited employees from engaging in sympathy strikes and would in cases such as the instant one, where a minor dispute is present, do violence to the minor dispute resolution mechanism of the RLA and the Supreme Court's decision in *Chicago River*.[9] We cannot

[9] The Supreme Court in *Burlington Northern*, after citing *Chicago River*, expressly recognized that *Burlington Northern* was "not a case in which the scheme of the RLA could not begin to

attribute such an anomalous result as being within the dictates of the Supreme Court's decision in *Burlington Northern*. The recognition that employees have broad rights to engage in secondary activity and the corollary that workers may honor these pickets is not inconsistent with requiring those workers to be bound by other contrary legal obligations that they have undertaken. *See Long Island R.R. v. International Ass'n of Machinists and Aerospace Workers*, 874 F.2d at 910 n.4 (noting that strikers seeking to engage in secondary picketing could enlist the support of unions not subject to the RLA or individual employees not acting in concert.).

In fact the Supreme Court impliedly recognized the validity of this principle in an opinion subsequent to *Burlington Northern*. *Trans World Airlines, Inc. v. Independent Federation of Flight Attendants*, 109 S.Ct. 1225 (1989). In *Trans World Airlines* the Court stated: "parties who have unsuccessfully exhausted the Railway Labor Act procedures for resolution of a major dispute may employ the full range of whatever peaceful economic power they can muster, *so long as its use conflicts with no other obligation imposed by federal law.*" *Id.* at 1233 (emphasis added) (quoting *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. at 369, 391-92 (1969)). Thus, to the extent that the Eastern employees right to engage in secondary activity can be said to bestow any right on the part of the unions to honor the strike, these rights are nevertheless subject to the obligations imposed on them by the RLA. Accordingly, we conclude that the right of the Eastern employees to engage in secondary picketing at SEPTA facilities does not necessarily engender a corresponding right on the part of the unions to honor the picket lines at this stage.

work without judicial involvement." This distinguishes *Chicago River*, and the instant case, from *Burlington Northern*. Indeed, recently the Supreme Court flatly recognized that "[c]ourts may enjoin strikes arising out of minor disputes," *Consolidated Rail Corp. v. Railway Labor Executives Ass'n*, 57 U.S.L.W. at 4743, without noting any possibility of an exception where such an injunction might dilute another unions right to engage in secondary activity.

2. *Applicability of Buffalo Forge*

Finally, the unions argue that "the district court committed clear legal error by completely disregarding *Buffalo Forge* [*Co. v. United Steelworkers of America, AFL-CIO*, 428 U.S. 397 (1976)], as a case arising under the NLRA and concluding that it was therefore without applicability under the RLA." SEPTA contends that the district court was correct in finding *Buffalo Forge* inapplicable. A brief discussion of *Buffalo Forge* is required in order to understand the positions of the parties.

In *Buffalo Forge* production and maintenance employees of the Buffalo Forge Company, represented by the United Steelworkers of America (the union), sought to engage in a sympathy strike with the office clerical-technical employees of Buffalo Forge. The union contended that such a sympathy strike was not in violation of the no-strike provision in their collective bargaining agreement. Buffalo Forge argued that the sympathy strike would violate the parties' collective bargaining agreement. It was uncontested that disputes regarding the breadth of the no-strike clause were within the ambit of the arbitration clause in the parties' collective bargaining agreement.

On these facts, the Supreme Court held that the district court lacked jurisdiction to issue an injunction against the union's sympathy strike. *Id.* at 404. The Court determined that the Norris-LaGuardia Act's prohibition against the issuance of labor-dispute injunctions, *see* 29 U.S.C. § 104,[10] should control notwithstanding § 301(a)

[10] Section 104 provides in pertinent part: "No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute."

of the Labor Management Relations Act, which granted district courts jurisdiction over suits for violations of contracts between employers and labor organizations.[11]

The stated basis for the Court's decision was the Court's fear that affording the district courts jurisdiction to grant injunctions in these types of cases would thrust the courts headlong into the business of interpreting collective bargaining agreements thereby unduly influencing the ultimate decisions of the arbitrators. *Id.* at 412. Such a result, the Court believed, would conflict with the federal policy of favoring dispute resolution via arbitration. *Id.* at 411. *See* Note, *The Applicability of Boys Markets Injunctions To Refusals To Cross A Picket Line*, 76 Colum. L. Rev. 113, 115 (1976). The unstated basis for the Court's decision was probably the Court's fear that "a contrary result would lead to fewer arbitration clauses in collective bargaining agreements, the unions being less willing to agree to arbitrate disputes or to proceed to arbitration following a preliminary injunction." *Trans Int'l Airlines v. International Brotherhood of Teamsters*, 650 F.2d 949, 966 (9th Cir. 1980).

The discrete question before this Court is whether *Buffalo Forge* should be applied by analogy from the NLRA context to the instant dispute under the RLA. We must approach this problem carefully, keeping in mind the Supreme Court's admonition not to import the NLRA "wholesale into the railway labor area." *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394

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[11] The Labor Management Relations Act, enacted in 1947, amended the NLRA. *See* 61 Stat. 139, 29 U.S.C. § 151 *et seq.* Section 301(a) of the LMRA provides: "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court in the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

U.S. at 383. Thus, "even rough analogies must be drawn circumspectly, with due regard for the many differences between the statutory schemes." *Id. See Trans World Airlines v. Independent Federation of Flight Attendants*, 109 S.Ct. at 1230.

We find the considerations underlying *Buffalo Forge* inapplicable to the RLA and therefore conclude that the district court did not err in refusing to apply *Buffalo Forge* to this case. In a dispute under the RLA, as described earlier, the court is called on only to determine if the party seeking the court's intervention has put forth an arguably justified position. In making this limited evaluation of the merits of the dispute, the court is in no way usurping the arbitrator's function nor unfairly predisposing the arbitrator toward the very tentative decision made by the district court. Thus, the stated basis for *Buffalo Forge* is not present. Moreover, the unarticulated basis for *Buffalo Forge*, fear that parties will not agree to arbitrate their disputes, is utterly irrelevant in the context of the RLA which requires parties to submit their minor disputes to binding arbitration. Finally, and perhaps most importantly, the RLA, unlike the NLRA, was enacted for the purpose of preserving industrial peace by avoiding strikes over minor disputes. *See Burlington Northern R.R. v. Brotherhood of Maintenance of the Way Employees*, 481 U.S. at 444-45. This Court should, therefore, not import principles established in the NLRA context into RLA cases when such action would have the effect of hindering the attainment of the underlying remedial goals of the RLA. *See Trans Int'l Airlines Inc. v. International Brotherhood of Teamsters*, 650 F.2d at 966.

Accordingly we conclude that the district court properly held that *Buffalo Forge* should not be applied to the instant case. We note that this conclusion is in accord with the result reached by the only other two courts of appeals to have faced the question. *Long Island R.R. v. Inter-*

national Ass'n of Machinists and Aerospace Workers, 874 F.2d at 909; *Trans Int'l Airlines Inc. v. International Brotherhood of Teamsters*, 650 F.2d at 969.

III. CONCLUSION

For all the foregoing reasons, we will affirm the order of the district court granting SEPTA a preliminary injunction.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 89-1604

SOUTH EASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, *et al.*

MEMORANDUM AND ORDER

VAN ANTWERPEN, J. March 8, 1989

Plaintiff South Eastern Pennsylvania Transportation Authority ("SEPTA") is before the Court seeking an injunction preventing defendants from honoring secondary picket lines. On March 3, 1989, the Honorable J.E. Dubois, acting as Emergency Judge, issued a temporary restraining order granting the plaintiff relief. In addition, as agreed to by the parties, the order continued in effect until this Court could render a decision on plaintiff's request for a preliminary injunction. From the evidentiary hearings held on March 7 and 8, 1989, we set forth the following facts:

At midnight, March 4, 1989, the International Association of Machinists and Aerospace Workers Union ("IAMAW") began a strike against Eastern Airlines. The parties have exhausted proceedings under the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq.* (1982),

and the dispute may be bitter and protracted. Counsel for the IAMAW Union was present in court and did not dispute that the IAMAW Union feels it has the right to conduct secondary picketing at various locations, including SEPTA facilities. For the purposes of this hearing, SEPTA does not dispute that IAM has the right to engage in this picketing.

Shortly after the Eastern strike began, SEPTA officials received a telegram from William W. Winpisinger, President of IAMAW, sent to the National Railway Labor Conference. It states that IAMAW is "contemplating secondary boycott action wherever possible" and that "in the railroad industry we are presently contemplating establishing secondary picketing on Monday, March 6, 1989, as early in the morning as possible at selected locations on several rail carriers including . . . SEPTA." In addition, the telegram requested that other unions refuse to cross the secondary picket lines. IAMAW does not dispute the substance of the telegram, and although it agrees that strikes are fluid, IAMAW concedes that it is likely that there will be secondary picketing. SEPTA comes before the Court in an effort to prevent its union employees from honoring any IAMAW secondary picket lines.

SEPTA is divided into four divisions: 1) the Regional Rail Division which, since January 1, 1983, took over the commuter lines formerly operated by the Reading Railroad, Conrail, and the Pennsylvania Railroad; 2) the City Transit Division which includes buses, trollies, subways, and elevated lines; 3) the Red Arrow Division which runs Suburban Delaware County and other lines; and 4) the Frontier Division which runs the Montgomery County suburban routes. Although it was once thought that all divisions were subject to the anti-secondary picketing provisions of Act 195, 43 P.S. §§ 1101.101 *et seq.* (Purdon Supp. 1988), it is clear that this act does not apply to the SEPTA Regional Rail Division. It is the Regional Rail Division which the IAMAW intends to

secondarily picket and which is the subject of this proceeding.

The defendant unions are all parties to collective bargaining agreements with SEPTA. With the exception of the International Brotherhood of Electrical Workers' agreement, each agreement contains a clause which reads substantially as follows:

NO STRIKE

> With respect to a strike by the Union, the provisions of the Railway Labor Act Apply.

The agreement between SEPTA and the International Brotherhood of Electrical Workers contains the following clause:

NO STRIKE

> For the duration of the Agreement, the Union, its officers, agents, representatives, and members shall not in any way, directly or indirectly authorize, cause, assist, encourage, participate in, ratify or condone any strike, sit-down, sit-in, slow-down, sympathy strike, cessation or stoppage of work, boycott, picketing, or other interference with or interruption of work at any of SEPTA's operations or the operations of any customer of SEPTA.
>
> The Union representatives shall use every reasonable effort to terminate the strike, sit-down, sit-in, slow-down, sympathy strike, cessation or stoppage of work, boycott picketing, or other interference with or interruption of the operation of SEPTA or any customer of SEPTA.

Except for the electrical workers' agreement, each agreement has attached to it a "side letter" agreement which purports to be signed by both SEPTA and the particular union in question. All the side letter agreements contain substantially similar language which refers to the no

strike section of the main agreement and prohibits each union from engaging in "any sympathy strike . . . in support of any job action or picketing by any SEPTA non-commuter rail employees." Policy statements of some of the defendant unions qualify this side letter clause. Although it agrees that "SEPTA's non-commuter rail employees" are not members of railroad labor organizations, the Brotherhood of Railroad Signalmen indicates that it will support strikes of railroad labor organizations. The United Transportation Union policy states that the union will support its members in not entering the affected territory if a strike of a nationally recognized labor organization is in effect and there is a real or potential danger to members or their families. Similarly, the Brotherhood of Locomotive Engineers policy states that it will support its members who, because of fear of hazard or injuries to themselves, their families, or their property, decline to cross picket lines.

The collective bargaining agreements in question were all negotiated in 1983 and have since been renewed without any written change in either the basic clauses pertaining to strikes or the side agreements. At the hearings the defendant unions did not dispute the validity of the collective bargaining agreements, but some witnesses did question the validity of the side agreements. The ultimate decision in this regard is one for arbitration. However, we have no difficulty in finding for the purposes of this hearing that SEPTA has clearly met its burden of proving that these side agreements were all properly executed by authorized representatives of the defendant unions and were contemplated as valid addendums to the main collective bargaining agreements. Since the main agreement of the International Brotherhood of Electrical Workers has a broad no-strike clause in its main collective bargaining agreement, there is no question that they have contractually agreed not to engage in any sympathy strike at any of SEPTA's operations. We must, however,

determine the meaning and scope of the other side agreements.

We are guided by the recent opinion of the Third Circuit Court of Appeals in *International Brotherhood of Electrical Workers Local 803, AFL-CIO v. National Labor Relations Board*, 826 F.2d 1283 (3d Cir. 1987), where the court reviewed a general prohibition against strikes and an arbitration clause. The court noted that although the case involved a petition for review from the National Labor Relations Board, the district court owed no particular deference to the board on matters of contract interpretation. The court then stated that

> [t]he waiver of the employees' statutory right to engage in sympathy strikes must be "clear and unmistakable." *Metropolitan Edison Co. v. NLRB*, 663 F.2d 478, 482 (3d Cir. 1981), *aff'd*, 460 U.S. 693, 103 S.Ct. 1467, 75 L.Ed.2d 387 (1983); *see also United Steelworkers v. NLRB*, 536 F.2d 550, 555 (3d Cir. 1976) ("a waiver of a statutory right must be clearly and unmistakably established, . . . and express language will not be read expansively"). "The extent of the waiver . . . ' "turns upon the proper interpretation of the particular contract . . . [which] must be read as a whole and in light of the law relating to it when made." ' " *Delaware Coca-Cola*, 624 F.2d at 1184 (quoting *Food Fair Stores, Inc. v. NLRB*, 491 F.2d 388, 395 (3d Cir. 1974) (quoting *Mastro Plastics*, 350 U.S. at 279, 76 S.Ct. at 356)). Thus, any analysis of the waiver issue must begin with an identification of the no-strike obligation in the parties' contract and a determination of its scope. *Id.* at 1287.

The court went on to state that "in the field of labor relations it is necessary to go beyond mere interpretation of contractual language," *id.* at 1294, and that "the words parties use in drafting contracts are only evidence

of their intent; the words are not themselves the parties' intent." *Id.* at 1296.

With such guidance, we find that SEPTA has presented us with testimony from which it could clearly be determined at arbitration that the language in the side letter agreements was intended to prohibit the defendant unions from honoring with a sympathy strike secondary picketing by *any* unions and not just strikes by "SEPTA non-commuter rail employees." SEPTA's chief witness testified that the parties intended this broader prohibition, and that because of careless drafting, the language of the side letter did not represent the true intent of the parties. Moreover, it clearly flies in the face of common sense to conclude that SEPTA would choose to limit sympathy strikes only to situations involving its own non-commuter rail employees. The unions would then be free to engage in a sympathy strike anytime there was secondary picketing by other unions, and this could result in more sympathy strikes than those occasioned by SEPTA non-commuter rail employees. Especially given that there have been no such strikes to date, this construction of the agreement would make little sense.

We are aware that four defendant union witnesses testified that they did not agree to the terms of the side agreements and that the main collective bargaining agreements have clauses which expressly state that they represent the complete agreement of the parties. We find, however, that SEPTA has clearly presented sufficient testimony for us to conclude that these issues should properly be arbitrated under the RLA and that SEPTA has properly requested such arbitration. We are also aware of the prohibitions of the Norris Laguardia Act, 29 U.S.C. § 101 *et seq.* (1982) and the policy against enjoining strikes pending arbitration under other labor acts. *See Buffalo Forge Co. v. United Steelworkers of America*, 428 U.S. 397 (1976). In the instant matter, however, we are dealing with unions which are all subject to the RLA.

In *Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad Co.*, 353 U.S. 30 (1957), *reh. den.*, 353 U.S. 948, the Supreme Court held that under the RLA federal district courts may enjoin strikes if they involve "minor" disputes. Minor disputes contemplate arbitration under a labor agreement while major disputes involve "disagreements in the bargaining process for a new contract." *Id.* at 33. The Court held that the specific provisions of the RLA take precedence over the more general provisions of the Norris Laguardia Act. Given the admitted existence of valid labor contracts, we find that the dispute over the meaning of the no strike clauses is a minor dispute under the RLA.

We acknowledge that more recently in *Burlington Northern Railroad Company v. Brotherhood of Maintenance of Way Employees*, —— U.S. ——, 107 S.Ct. 1841 (1987), the Supreme Court held that the Norris Laguardia Act does prevent a court from enjoining secondary picketing under the RLA in a major dispute. However, in the instant matter, we are not dealing with a major dispute and we are not enjoining secondary picketing.

We take particular guidance from the decision of then Judge (now Justice) Kennedy in *Trans International Airlines, Inc. v. International Brotherhood of Teamsters*, 650 F.2d 949 (9th Cir. 1980) where the court held that a district court had the power under the RLA to enjoin a sympathy strike pending resolution of a "minor" dispute over the meaning of a no strike clause. Based on the hearing testimony and our common-sense analysis state above, it is clear that for the purposes of this hearing, a sympathy strike violates the no-strike clauses of the labor agreements. We also believe that a sympathy strike would violate the policy of the RLA.

Having resolved this issue, we find that SEPTA has satisfied the other criteria for a preliminary injunction: 1) that SEPTA would suffer irreparable harm in the loss

of both long and short term ridership and revenues; 2) that the balance of injury between SEPTA and the unions clearly favors SEPTA because other than their desire to show solidarity with brother unions, defendants have no real interest at stake; 3) that there is a probability that plaintiff will succeed on the merits; and 4) that the public interest is served by granting this injunction. It takes little imagination to project the harm and danger which would immediately flow from the cessation of 90,000 passenger rail trips each day. This is particularly so at this time of year when major highways in Philadelphia are under construction. Thus, we will grant SEPTA's motion for a preliminary injunction.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 89-1604

SOUTHEASTERN PENNSYLVANIA
TRANSPORTATION AUTHORITY,
Plaintiff,

vs.

BROTHERHOOD OF RAILROAD SIGNALMEN
Suite 704
Railway Labor Building
400 First Street N.W.
Washington, D.C. 20001

and

ROLAND E. MCKENZIE,
General Chairman
BROTHERHOOD OF RAILROAD SIGNALMEN
Griest Building, Suite 508
8 North Queen Street
Lancaster, PA 17603

and

V.M. SPEAKMAN, President
BROTHERHOOD OF RAILROAD SIGNALMEN
601 West Golf Road
Mt. Prospect, ILL 60056

and

W. KEEBLER, Local Chairman
BROTHERHOOD OF RAILROAD SIGNALMEN
906 Cedar Lane
Norristown, PA 19401

and

BROTHERHOOD OF LOCOMOTIVE ENGINEERS
16 W. Elizabeth Avenue
Linden, NJ 07036

and

BROTHERHOOD OF LOCOMOTIVE ENGINEERS
105 Wolf Road
Albany, NY 12205

and

BROTHERHOOD OF LOCOMOTIVE ENGINEERS
455 Empire Boulevard
Rochester, New York 14609

and

LARRY MCFATHER, President
BROTHERHOOD OF LOCOMOTIVE ENGINEERS
B of LE Building
1365 Ontario Street
Cleveland, OH 44114

and

R.W. GODWIN, General Chairman
BROTHERHOOD OF LOCOMOTIVE ENGINEERS
97 South Buffalo Street
Hamburg, NY 14075

and

T.J. DORRICOTT, Vice Chairman
BROTHERHOOD OF LOCOMOTIVE ENGINEERS
499 W. Jefferson Street
Media, PA 19063

and

GEOFFREY ZEH, President
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
12050 Woodward Avenue
Detroit, MI 48203

and

WILLIAM LARVE, Vice-President
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
106 Brandywine Avenue
Downingtown, PA 19335

and

LEONARD W. ALLEN, General Chairman
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
Raymond-Commerce Bldg.
Suite 1227-8
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Newark, NJ 07102

and

A. BENZ, Local Chairman
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
4630 Unruh Street
Philadelphia, PA 19135

and

R.I. KILROY, Int'l. President
TRANSPORTATION COMMUNICATIONS UNION
3 Research Place
Rockville, MD 20850

and

HOWARD RANDOLPH, General Chairman
TRANSPORTATION COMMUNICATIONS UNION
1522 Locust Street
Philadelphia, PA 19102

and

LANCE ROGERS, District Chairman
617 E. Woodlawn Street
Philadelphia, PA 19144

and

C.E. WHEELER, President
BROTHERHOOD OF RAILWAY CARMEN
4929 Main Street
Kansas City, MD 64112

and

A.J. TITUS, Local Chairman
BROTHERHOOD OF RAILWAY CARMEN
4632 Edmund Street
Philadelphia, PA 19124

and

JAMES J. PARRY, General Chairman
BROTHERHOOD OF RAILWAY CARMEN
219 New Dover Road
Colonia, NJ 07067

and

EDWARD P. MCENTEE, Int'l. Vice-President
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS
10400 West Higgins Road
Rosemont, ILL 60018

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS
1015 Chestnut Street, Room 515
Philadelphia, PA 19107

and

HARVEY LINDENMUTH, General Chairman
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS
425 Creek Road
Doylestown, PA 18901

and

F.A. HARDIN, President
UNITED TRANSPORTATION UNION
14600 Detroit Avenue
Cleveland, OH 44107

and

C.P. JONES, General Chairman,
UNITED TRANSPORTATION UNION
3 Penn Center Plaza
Suite 1422
Philadelphia, PA 19102

and

D.M. THOMPSON, Local Chairman
UNITED TRANSPORTATION UNION
1520 Woodbine Avenue
Bensalem, PA 19026

and

J.E. BURNS, President
INTERNATIONAL ASSOCIATION OF MACHINISTS
2600 Dixwell Avenue
Hamden, CT 06514

and

INTERNATIONAL ASSOCIATION OF MACHINISTS
220 Oaktree Road
Norristown, PA 19401

and

CHARLES C. ARTHUR, JR., General Chairman
INTERNATIONAL ASSOCIATION OF MACHINISTS
580 East Broadway
Greenwood, Indiana 46142

and

KEITH BEAN, Local Chairman
INTERNATIONAL ASSOCIATION OF MACHINISTS
220 Oaktree Road
Norristown, PA 19401

and

SHEETMETAL WORKERS INTERNATIONAL ASSOCIATION
5111 South Eighth Road
Building #1
Apartment 208
Arlington, VA 22204

and

SHEETMETAL WORKERS INTERNATIONAL ASSOCIATION
100 Parker Place
New Haven, CT 06512

and

RICHARD KING, International Representative
SHEETMETAL WORKERS INTERNATIONAL ASSOCIATION
5111 South Eighth Road
Building #1
Apartment 208
Arlington, VA 22204

and

R. P. BRANSON, General Chairman
SHEETMETAL WORKERS INTERNATIONAL ASSOCIATION
2841 Akron Place, SE
Washington, DC 20020

and

R.F. SCHEMBS, Local Chairman
SHEETMETAL WORKERS INTERNATIONAL ASSOCIATION
412 Burke Avenue
Ridley Park, PA 19078

and

TRANSPORT WORKERS UNION OF AMERICA
3126 Market Street
Philadelphia, PA 19104

and

TRANSPORT WORKERS UNION OF AMERICA
80 Westend Avenue
New York, NY 10023

and

CHARLES H. LITTLE, President
TRANSPORT WORKERS UNION OF AMERICA
P.O. Box 699
Broomall, PA 19008

PRELIMINARY INJUNCTION

AND NOW, this 8th day of MARCH, 1989, upon consideration of the Motion for Preliminary Injunction and after hearing testimony in open court and it appearing that defendants will engage in a sympathy strike or work stoppage or a refusal to cross picket lines of Eastern Airline Machinists or others acting in concert with them in probable violation of their respective collective bargaining agreements with plaintiff and thus the Railway Labor Act, that plaintiff and defendants are statutorily bound to follow certain arbitration procedures with regard to defendants' claims, and that plaintiff is ready, willing and able to comply with such provisions; that injunctive relief is necessary to preserve unimpaired the arbitration procedures required by the Railway Labor Act; and it further appearing that unless enjoined and restrained defendants' sympathy strike or work stoppage or refusal to cross picket lines of Eastern Airline Machinists or others acting in concert with them will cause substantial, immediate and irreparable harm to plaintiff Southeastern Pennsylvania Transportation Authority ("SEPTA") as well as to the general public, the amount of which cannot be definitely ascertained, in that:

(a) Plaintiff will be unable to operate its commuter rail service to the serious detriment of both plaintiff and the public;

(b) There will be an overwhelming disruption of service to the traveling public in that the shutdown of commuter rail lines will paralyze the entire City of Philadelphia and metropolitan area. In short, although the City of Philadelphia is dependent upon SEPTA's commuter rail division for some 90,000 passenger journeys per week day, commuter rail transportation service will be interrupted by defendants' refusal to cross picket lines established by International Association of Machinists employed by Eastern Airlines;

(c) There will be an immediate and continuing loss of SEPTA's commuter rail division patronage and ridership;

(d) There will be a considerable, permanent loss of patronage as a result of cessation of commuter rail service, however temporary the cessation period;

(e) The functioning of said transit system as an effective instrument of mass transportation, the sole reason for its acquisition by SEPTA, will be seriously and permanently impaired;

(f) Hazardous conditions in components of SEPTA's rail service system will develop and will go undetected and uncorrected to the peril of its passengers, its employees and the general public;

(g) Plaintiff will be unable to provide for the general maintenance of its equipment and rolling stock required to prevent damage to said equipment and rolling stock;

(h) The absence of commuter rail service will greatly increase the numbers of persons utilizing automobiles, causing congestion and standstills on the already burdened traffic arteries of the region, many of which are undergoing extensive repairs, such as the Schuylkill Expressway, increase driving hazards and cause high levels of air pollution; and further, that the plaintiff and the public will suffer the aforementioned immediate and sub-

stantial irreparable harm if a restraining order does not issue forthwith.

IT IS HEREBY:

ORDERED, ADJUDGED AND DECREED until further hearing and further Order of this Court that defendants, their respective members and all others conspiring, acting in concert, or otherwise participating with them, or acting in their aid or behalf, are enjoined and restrained from:

(a) violating the Railway Labor Act by engaging in a sympathy strike or refusing to cross picket lines established by International Association of Machinists employed by Eastern Airlines or others acting in concert therewith prior to a declaration or adjudication of their right to do so via the statutorily mandated minor dispute resolution procedures; violating the Railway Labor Act by engaging in a strike over a minor dispute; breaching their collective bargaining agreements with plaintiff by refusing to cross picket lines established by International Association of Machinists employed by Eastern Airlines or persons acting in concert therewith, engaging in any strike, including sympathy strikes, failing to report for work, engaging in work stoppages or slowdowns, abstaining in whole or in part from the whole, faithful and proper performance of their duties of employment with plaintiff, SEPTA, picketing, or otherwise individually or in concert interfering with plaintiff SEPTA's normal operations and/or

(b) encouraging or inducing others to engage in any of the aforesaid activities, and

(c) refusing to perform any procedure which they or their individual members are directed to follow in order to maintain continuing service on the SEPTA commuter rail division.

2. That true but uncertified copies of the Complaint of of this Order and Motion may be served upon each of the defendants.

3. That plaintiff has leave to serve additional true but uncertified copies of the Complaint and of this Order and Motion upon any of the defendants and upon any of the persons acting in concert with them or otherwise participating with them or acting in their aid or behalf.

4. That plaintiff's attorneys or any agents designated by plaintiff may serve true but uncertified copies of the Complaint and of this Order and Motion upon any of the defendants and upon any persons acting in concert with them or otherwise participating with them or acting in their aid or behalf.

5. That defendant and plaintiff proceed to arbitration under their respective contracts and the Railway Labor Act minor dispute resolution procedures to resolve their dispute concerning defendant unions' claimed right to honor the International Association of Machinists employed by Eastern Airlines picket lines.

6. That the United States Marshal enforce this Order.

7. That any violators of this Order be brought immediately before this Court.

8. A bond in the amount of $5,000.00 shall be entered by Plaintiff.

BY THE COURT:

/s/ Franklin S. Van Antwerpen
FRANKLIN S. VAN ANTWERPEN
U.S.D.J.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-1174

SOUTHEASTERN PENNSYLVANIA
TRANSPORTATION AUTHORITY

v.

BROTHERHOOD OF RAILROAD SIGNALMEN, *et al.*

Brotherhood of Railway Signalmen; Ronald E. McKenzie, General Chairman, Brotherhood of Railway Signalmen; V.M. Speakman, President, Brotherhood of Railway Signalmen; W. Keebler, Local Chairman, Brotherhood of Railway Signalmen; Brotherhood of Locomotive Engineers; Larry McFather, President, Brotherhood of Locomotive Engineers; R.W. Goodwin, General Chairman, Brotherhood of Locomotive Engineers; T.J. Dorricott, Vice Chairman, Brotherhood of Locomotive Engineers; Geoffrey Zeh, President, Brotherhood of Maintenance of Way Employees; William Larve, Vice-President, Brotherhood of Maintenance of Way Employees; Leonard W. Allen, General Chairman, Brotherhood of Maintenance of Way Employees; A. Benz, Local Chairman, Brotherhood of Maintenance of Way Employees; R.I. Kilroy, International President, Transportation Communications Union; Howard Rudolph, General Chairman, Transportation Communications Union; Lance Rogers, District Chair-

man; C.E. Wheeler, President, Brotherhood of Railway Carmen; A.J. Titus, Local Chairman, Brotherhood of Railway Carmen; James J. Parry, General Chairman, Brotherhood of Railway Carmen; Edward P. McEntee, International Vice-President, International Brotherhood of Electrical Workers; Harvey Lindemuth, General Chairman, International Brotherhood of Electrical Workers; F.A. Hardin, President; C.P. Jones, Chairman, United Transportation Union; D.M. Thompson, Local Chairman, United Transportation Union; J.E. Burns, President, International Association of Machinists; International Association of Machinists; Charles C. Arthur, Jr., General Chairman, International Association of Machinists; Keith Bean, Local Chairman, International Association of Machinists; Sheetmetal Workers International Association; Richard King, International Representative, Sheetmetal Workers International Association; R.P. Branson, General Chairman, Sheetmetal Workers International Association; R.F. Schembers, Local Chairman, Sheetmetal Workers International Association; Transportation Workers Union of America; Charles H. Little, President, Transportation Workers Union of America;

Appellants

Appeal from the
United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 89-1604)

Present: SEITZ,* SLOVITER and GREENBERG, *Circuit Judges*

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* Since the date of oral argument, Judge Seitz has taken senior status.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel April 18, 1989.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered March 8, 1989, be, and the same is hereby affirmed. Costs taxed against the appellants. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ Sally Mrvos
Clerk

August 14, 1989

Costs taxed in favor of appellee as follows:

TOTAL OF BRIEF $289.60

Certified as a true copy and issued in lieu of a formal mandate on September 5, 1989.

Test: M. Elizabeth Ferguson

Chief Deputy Clerk, United States Court of Appeals, for the Third Circuit

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-1174

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY

vs.

BROTHERHOOD OF RAILROAD SIGNALMEN, *et al.*
(E.D. PA Civil No. 89-1604)

Present: SEITZ AND GREENBERG, *Circuit Judges.*

Motion by appellant, Unions, for an order suspending injunction granted March 8, 1989 pending appeal

/s/ Debra Ruh
Deputy Clerk 7-5019

ORDER

The foregoing Motion is denied solely on the ground that the public interest dictates such a result here. This order is, of course, without prejudice to the filing of any application to expedite the underlying appeal.

By the Court,

/s/ Collins J. Seitz
Circuit Judge

Dated: Mar. 9, 1989

APPENDIX E

SUPREME COURT OF THE UNITED STATES

No. A-715

BROTHERHOOD OF RAILROAD SIGNALMEN *et al.*

v.

SOUTHEASTERN PENNSYLVANIA
TRANSPORTATION AUTHORITY

ON APPLICATION TO VACATE INJUNCTION

[March 14, 1989]

JUSTICE BRENNAN, Circuit Justice.

Applicants request me, as Circuit Justice, to enter an order "immediately dissolving" the injunction issued by the District Court for the Eastern District of Pennsylvania. I deny the application. In my view, applicants have not "established that there is a 'reasonable probability' that four Justices will consider the issue sufficiently meritorious to grant certiorari." *Rostker* v. *Goldberg*, 448 U.S. 1306, 1308 (1980) (Chambers Opinion).

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 89-5229

EASTERN AIR LINES, INC.,
Plaintiff-Appellant,

-versus-

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
HENRY DUFFY,
International President,
EASTERN MASTER EXECUTIVE COUNCIL,
JOHN J. DAVIS, Chairman,
EASTERN MEC,
JANE DOE and JOHN DOE,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

[Filed Mar. 24, 1989]

Before TJOFLAT, ANDERSON and EDMONDSON, Circuit Judges.

BY THE COURT:

This is an appeal from a denial of a preliminary injunction. Whether injunctive relief is available in this

case depends on various sections of the Railway Labor Act ("RLA"), 45 U.S.C. secs. 151 *et seq.* Therefore, the federal courts have federal question jurisdiction under 28 U.S.C. secs. 1331 and 1337.

Unambiguous violations of the RLA can be enjoined in federal court. *Burlington N. R.R. v. B.M.W.E.*, 107 S.Ct. 1841 (1987). Under the RLA, major disputes[1] trigger a status quo obligation. The status quo requirement prevents "the union from striking and management from doing anything that would justify a strike." *Detroit & Toledo S. L. R. v. United Transp. U.*, 396 U.S. 142, 150, 90 S.Ct. 294, 299 (1969). Eastern Airlines and ALPA are now in a major dispute about the provisions of ALPA's next contract. IAM, another union, is lawfully on strike against Eastern; and ALPA claims to be engaged in a sympathy strike supporting IAM's strike. Ordinarily, it is lawful to honor picket lines, and the RLA does not unambiguously preclude sympathy strikes. *See generally Eastern Air Lines v. Flight Engineers*, 340 F.2d 104 (5th Cir. 1965) (strikes that do not relate to major or minor dispute with employer are not violative of RLA). Nevertheless, a claim of sympathy strike cannot be used as a pretext to shield conduct that otherwise would be a clear violation of the RLA. So, if a sympathy strike is a pretext for self-help, the strike violates the RLA; the pretext may be disregarded; and the self-help strike may be enjoined.

The district court made no findings of fact on pretext. Because the district court declined to make the necessary finding of fact about pretext, we VACATE its order and REMAND for the limited purpose of conducting further

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[1] For RLA purposes, a "major" dispute relates to changes affecting rates of pay, rules or working conditions. "Minor" disputes require the interpretation of an existing collective bargaining agreement.

proceedings to make findings of fact on the pretext issue.[2] In the interest of judicial economy, we retain jurisdiction over the appeal. The district court shall promptly certify its findings to this court.

---

[2] ALPA is not on strike over whether its strike is permitted by ALPA's present contract with Eastern; thus, the strike is not over a minor dispute under the RLA. Accordingly, an injunction cannot be warranted on this ground. *See Jacksonville Bulk Terminals v. Intern. Longshoremen's Ass'n*, 457 U.S. 702, 102 S.Ct. 2672 (1987) (a National Labor Relations Act case). It is proper to look to NLRA cases for help in construing the RLA. *Brotherhood of R.R. Tr. v. Jacksonville Term. Co.*, 394 U.S. 369, 383, 89 S.Ct. 1109, 1118 (1969).

APPENDIX G

LIST OF PARTIES

Petitioners are the following unions and union officers representing the employees of Respondent:

Brotherhood of Railroad Signalmen;

Ronald E. McKenzie, General Chairman, Brotherhood of Railroad Signalmen;

V.M. Speakman, President, Brotherhood of Railroad Signalmen;

W. Keebler, Local Chairman, Brotherhood of Railroad Signalmen;

Brotherhood of Locomotive Engineers;

Larry McFather, President, Brotherhood of Locomotive Engineers;

R.W. Goodwin, General Chairman, Brotherhood of Locomotive Engineers;

T.J. Dorricott, Vice Chairman, Brotherhood of Locomotive Engineers;

Geoffrey Zeh, President, Brotherhood of Maintenance of Way Employes;

William Larve, Vice-President, Brotherhood of Maintenance of Way Employes;

Leonard W. Allen, General Chairman, Brotherhood of Maintenance of Way Employes;

A. Benz, Local Chairman, Brotherhood of Maintenance of Way Employes;

R.I. Kilroy, International President, Transportation Communications Union;

Howard Randolph, General Chairman, Transportation Communications Union;

Lance Rogers, District Chairman, Transportation Communications Union;

C.E. Wheeler, President, Brotherhood Railway Carmen;

A.J. Titus, Local Chairman, Brotherhood Railway Carmen;

James J. Parry, General Chairman, Brotherhood Railway Carmen;

International Brotherhood of Electrical Workers;

Edward P. McEntee, International Vice-President, International Brotherhood of Electrical Workers;

Harvey Lindemuth, General Chairman, International Brotherhood of Electrical Workers;

F.A. Hardin, President, United Transportation Union;

C.P. Jones, Chairman, United Transportation Union;

D.M. Thompson, Local Chairman, United Transportation Union;

J.E. Burns, International Association of Machinists; International Association of Machinists;

Charles C. Arthur, Jr., General Chairman, International Association of Machinists;

Keith Bean, Local Chairman, International Association of Machinists;

Sheetmetal Workers International Association;

Richard King, International Representative, Sheetmetal Workers International Association;

R.P. Branson, General Chairman, Sheetmetal Workers International Association;

R.F. Schembs, Local Chairman, Sheetmetal Workers International Association;

Transportation Workers Union of America;

Charles H. Little, President, Transportation Workers Union of America.

Respondent is the Southeastern Pennsylvania Transportation Authority.

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No. 89-756

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

BROTHERHOOD OF RAILROAD SIGNALMEN
AFL-CIO, et al.,
Petitioners

v.

SOUTHEASTERN PENNSYLVANIA
TRANSPORTATION AUTHORITY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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DATED: December 15, 1989

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QUESTION PRESENTED

Whether the Courts below correctly concluded that the collective bargaining agreements between SEPTA and its commuter rail unions, each of which contains no-strike clauses, arguably preclude a sympathy strike and, accordingly, properly enjoined such a strike pending compulsory arbitration of the scope of the no-strike provisions under the Railway Labor Act's minor dispute resolution procedures?

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Respondent, Southeastern Pennsylvania Transportation Authority ("SEPTA") respectfully requests that this Court deny the Petition for a Writ of Certiorari filed by the Brotherhood of Railroad Signalmen, *et al.* (the "Unions"). The Unions seek review of the Third Circuit's opinion affirming the District Court's preliminary injunction against a sympathy strike by the Unions. That opinion is reported at 882 F.2d 778 (3d Cir. 1989) and is reproduced in the Appendix to the Petition ("Pet. A".) 1a-26a.

STATEMENT OF THE CASE

SEPTA operates an urban mass transportation system serving the counties of Philadelphia, Bucks, Montgomery, Chester and Delaware in the Commonwealth of Pennsylvania as well as Mercer County in the State of New Jersey and New Castle County in the State of Delaware. The system consists of the City Transit Division which operates subways, buses and trolleys within the City of Philadelphia; the Red Arrow Division, which operates buses and inter-urban trolleys in Delaware and Montgomery counties, Pennsylvania; the Frontier Division, which operates bus routes predominantly in Montgomery and Bucks counties; and, the Regional Rail Division, which operates the commuter railroads in the seven county area.[1] The Regional Rail Division makes in excess of 90,000 passenger trips per day in the tri-state area. Pet. A. 4a.

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1. SEPTA operates the commuter railroads pursuant to the Congressional mandate contained in the Rail Passenger Service Act, 45 U.S.C. §581-591, the Regional Rail Reorganization Act, 45 U.S.C. §702 and 744(a) and the Northeast Rail Service Act, 45 U.S.C. §1101-1104, which governed the transfer of Conrail's commuter rail operations in the Northeast Corridor to various "commuter authorities", including SEPTA.

The Unions consist of various labor organizations which represent employees of the Regional Rail Division, including a small bargaining unit composed of approximately 30 machinists represented by a local union of Petitioner International Association of Machinists ("IAM"). Joint Appendix Before The United States Court of Appeals for the Third Circuit ("J.A.") 115. This case arose when the IAM, on behalf of its striking members employed by Eastern Airlines ("Eastern"), threatened to erect picket lines at SEPTA commencing on Monday morning, March 6, 1989. The Unions expressly stated their intention to honor such picket lines. Pet. A. 4a-5a; J.A. 173-181.

SEPTA took over Conrail's commuter operations in the Philadelphia region on July 1, 1983. It then negotiated collective bargaining agreements with the Unions. Each of the agreements negotiated in 1983, and since renewed, contains an arbitration provision and no-strike provisions. The no-strike provision in the body of each of the agreements, except that with the International Brotherhood of Electrical Workers ("IBEW"), provides that:

> With respect to a strike by this Union, the provisions of the Railway Labor Act shall apply.

Each such contract also contains a side letter of agreement containing "additional understandings" regarding the no-strike obligation. The texts of the side letters vary, but all specifically preclude sympathy strikes in support of picketing by "SEPTA non-commuter rail employees."[2] None restrict the ban to that situation. To the contrary, the side letters of the Brotherhood of Railroad Signalmen ("BRS"), United Transportation Union ("UTU") and Brotherhood of Locomotive Engineers ("BLE"), define the specific circum-

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2. The IBEW agreement contains an express ban on sympathy strikes in its main body without reference to any side letter. Pet. A. 5a n. 2.

stances under which those unions *would* conduct a sympathy strike. For example, that of the BRS states that the no-strike clause and side letter are subject to the policy of that union "to support its members in declining to work when another *railroad labor organization* is on strike." (emphasis added). The BLE and UTU agreements predicate the honoring of picket lines on a finding of fear of physical danger by their respective members. Pet. A. 5a-7a.

SEPTA understood that these no-strike provisions and side letters precluded any sympathy strike by the Unions on the Regional Rail Division, except in the event of a primary strike by one of the Unions against the Regional Rail Division itself. Pet. A. 15a-17a.[3] At the preliminary injunction hearing, Transportation Communications Union ("TCU") International Vice-President Robert Scardeletti ("Scardeletti"), who participated actively in the 1983 bargaining, substantially corroborated that understanding. Scardeletti recalled that when he explained the no-strike clause during the 1983 membership ratification process, he told his membership that if a "rail union" put up a picket line, they could honor it. J.A. 227-228. Scardeletti does not consider the Eastern Airlines machinists, whose threat to picket SEPTA precipitated this proceeding, to be a "rail union" and, to the contrary, testified that:

---

3. The Unions claim that notwithstanding their agreement to no-strike clauses, they intended to preserve whatever rights they had to conduct secondary picketing or to honor secondary picket lines as those rights existed in 1983. J.A. 216-217. As of 1983, the Unions' right to conduct or to honor secondary picketing was significantly limited by the then prevailing "substantial alignment" doctrine. *Ashley, Drew and Northern Railways v. United Transportation Union*, 625 F.2d 1357, 1364-1365 (8th Cir. 1980); *Lakefront Dock and Railroad Terminal Company v. International Longshoremen's Association*, 333 F.2d 549, 553 (6th Cir. 1962); *Brotherhood of Railroad Trainmen v. Atlantic Coast Line Railroad Company*, 362 F.2d 649 (5th Cir.), *aff'd*, 385 U.S. 20 (1966).

> I would have to say that's an airline union. I mean, that's the only thing I would call it. I couldn't call it a rail union if it's not on the rail.

J.A. 228.

Following the IAM's threat to conduct secondary picketing of SEPTA in connection with the Eastern strike, there occurred a series of telephone conversations between SEPTA's Acting Chief Industrial Relations Officer Robert Birnbrauer and officials of the Unions. In those conversations, the Unions stated that their respective members would honor any picket line set up by the Eastern machinists at SEPTA's facilities. Accordingly, on Friday, March 3, 1989, Birnbrauer sent a mailgram to each of the Unions confirming that SEPTA considered the various collective bargaining agreements to require the members of the Unions employed by SEPTA to cross any such picket lines and report to work as usual. J.A. 94-95. On that evening, the District Court imposed a temporary restraining order against the threatened sympathy strikes. On Tuesday, March 7, 1989, SEPTA formally submitted the disputes over the interpretation of the various no-strike clauses and side letters to arbitration. J.A. 84-93; Pet. A. 32a.

On March 7 and 8, 1989, an evidentiary hearing was held before the District Court. Following the submission of proposed findings of fact and conclusion of law, on Wednesday afternoon, March 8, 1989, the Court issued a memorandum and preliminary injunction order continuing the temporary restraining order. Neither the temporary restraining order nor the preliminary injunction contains any restraint whatsoever on picketing by the Eastern machinists represented by the IAM. Rather, the injunction applies solely to the actions of the commuter rail employees employed by SEPTA. Pet. A. 4a.-5a.[4] Moreover, the injunction only prohibits the

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4. The Unions have continuously mischaracterized the nature of the injunction as being against conduct by the Eastern Airlines

Unions "from striking pending resolution of the minor dispute", Pet. A. 19a, over the scope of the no-strike obligation by arbitration.

REASONS FOR DENYING THE PETITION

Despite the Unions' attempt to rephrase the issues, expand the Questions Presented,[5] and fashion a conflict,

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NOTES *(Continued)*

machinists who are lawfully striking that airline. For example, in their Emergency Application for Stay and for Vacation of Injunction to Justice Brennan filed March 10, 1989, the Unions, at page 3, protested that:

> "The District Court has thrown in its lot with Eastern."
>
> and
>
> "The federal judiciary has provided another victory for Eastern."

See also the Petition for Certiorari herein ("Pet.") at pages 8-10 and the Petitioner's parallel Petition for Certiorari to the United States Court of Appeals for the Second Circuit (parts of which are incorporated by reference in the present Petition) at pages 6-7.

The Unions argue that "the decision below . . . is in everything but name an across-the-board proscription on sympathy strikes in the railroad and airline industries . . . Pet. 8; "the court of appeals gave *no weight whatsoever* to the rights of the Eastern employees." Pet. 9; and, "[the decision below] negate[s] the basic statutory right to strike and to picket for a new collective bargaining agreement merely upon finding that the position of one party is 'arguable' ". Pet. 10. Thus, the Unions continue to ignore the fact that the Eastern machinists are not and never have been a party to this litigation nor are they subject to the preliminary injunction.

5. The Unions have posed identical Questions Presented in the petition filed in this case and that filed in *International Association of Machinists and Aerospace Workers, AFL-CIO v. The Long Island Railroad Company*, No. 89-427 ("Second Circuit Pet."). *See* Pet. (i). The Unions have also incorporated pages 4-16 of the Second Circuit Petition by reference. *See* Pet. 7. (The Unions served SEPTA with the Second Circuit Petition, Pet. 7 n.9, but failed to serve SEPTA with their Reply Brief in No. 89-427 filed on November 20, 1989. Therefore, the Reply Brief is not treated as incorporated in this Petition). SEPTA, therefore, incorporates by reference the Briefs in Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit filed by Respondents, Long

the issue before the Supreme Court is that presented to the Third Circuit and articulated by that court as follows:

> The threshold question is whether the dispute between SEPTA and the unions can be termed a "minor dispute" as that phrase is used in the context of the RLA. 45 U.S.C. §151 *et seq.* If we find that a minor dispute exists, we must then determine whether the preliminary injunction prohibiting the unions from going on strike was properly issued.

Pet. A. 8a. Relying on the decision in *Consolidated Rail v. Railway Labor Executives' Association,* 109 S.Ct. 2477 (1989), the Third Circuit further defined the "discrete question" to be:

> . . . whether SEPTA met its light burden of showing that the no-strike provisions in the respective collective bargaining agreements, taken in conjunction with the side letter agreements, policy statements and any other evidence of the intent of the parties which may properly be considered, *arguably prohibit the unions from engaging in a sympathy strike with the Eastern employees at this point.*

Pet. A. 10a (emphasis added). The Unions represent the issue as being one which:

NOTES *(Continued)*

Island Railroad Company and Metro-North Commuter Railroad-Company on October 23, 1989 and Respondent, National Railroad Passenger Corporation ("Amtrak") on November 15, 1989.

By incorporating pages 4-16 of the Second Circuit Petition by reference, the Unions present their argument for certiorari in the context of the Second Circuit decision and not that of the Third Circuit. Although the Second Circuit decision is wholly consistent with that of the Third Circuit, it was decided before this Court's decisions in *Consolidated Rail v. Railway Labor Executives' Assn.,* 109 S.Ct. 2477 (1989) and *Pittsburgh & Lake Erie Railroad Company v. Railway Labor Executives Assn.,* 109 S. Ct. 2584 (1989). Therefore, the Second Circuit could not rely on those decisions as did the Third Circuit.

> . . . raises an absolutely fundamental question of federal labor policy: whether the federal courts' equity powers should be directed against concerted refusals to work that do not arise out of the employees' dispute with their immediate employer but out of a refusal to cross a picket line set up by another group of organized employees in the latter's effort to obtain a new collective bargaining agreement.

Pet. 6. The Unions thereby seek to strengthen the economic and political position of the Eastern machinists at the expense of the Unions' express contractual commitments to SEPTA to arbitrate disputes, to eschew sympathy strikes and not to strike in violation of the Railway Labor Act, 29 U.S.C. §151 *et seq.* ("RLA").

I. THE DECISION OF THE THIRD CIRCUIT IS CONSISTENT WITH THE HOLDINGS OF THIS COURT AND WITH CONGRESSIONAL POLICY UNDERLYING THE RAILWAY LABOR ACT.

The Supreme Court decisions against which the Third Circuit's decision in this case must be measured are those in *Brotherhood of Railroad Trainmen v. Chicago River and Indiana Railroad Co.*, 353 U.S. 30 (1957), *Consolidated Rail Corp. v. Railway Labor Executives' Assn.*, 109 S.Ct. 2477 (1989) and *Pittsburgh & Lake Erie Railroad Co. v. Railway Labor Executives' Assn.*, 109 S.Ct. 2584 (1989). The Third Circuit's decision in this case is completely consistent with those decisions and with the purposes of the RLA. It correctly placed diminished emphasis on law developed under the National Labor Relations Act, 29 U.S.C. §151 *et seq.*[6] ("NLRA").

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6. The Second Circuit heard oral argument in *Long Island Railroad v. International Association of Machinists*, 874 F.2d 901 (2d Cir. 1989) on March 28, 1989 and rendered its opinion on April 10, 1989. The Third Circuit heard oral argument on April 18, 1989 but did not render its opinion until August 14, 1989. This Court

A. Unlike The National Labor Relations Act, In The RLA, Congress Provided For Compulsory Arbitration Of Grievances And Thereby Imposed A Statutory No-Strike Clause.

There are basic differences in the nature of the two statutes. In *Chicago River,* this Court reviewed the legislative history of the 1934 amendment to the RLA, which inserted § 153, First, creating the National Railroad Adjustment Board and imposing "compulsory arbitration" of minor disputes "over the meaning of an existing collective bargaining agreement in a particular fact situation." 353 U.S. at 33. The impetus for the 1934 amendment arose from the many strikes that had occurred in minor dispute situations after the enactment of the RLA in 1926. 353 U.S. at 35-36.

The Court, noting that not all unions concurred in the 1934 legislation, quoted a representative of the Teamsters, who testified before the Senate that:

> We are unalterably opposed to paragraph M, . . . [which] brings about compulsory arbitration and prevents the use of the only weapon in the hands of organized labor. . . .

353 U.S. at 39. Notwithstanding that "[t]he voice of labor was not unanimous", the Court noted that:

> This record is convincing that there was general understanding between both the supporters and the opponents of the 1934 amendment that the provisions dealing with the Adjustment Board were to be considered as compulsory arbitration in this limited

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NOTES *(Continued)*

handed down *Consolidated Rail* and *Pittsburgh & Lake Erie,* two RLA cases, on June 19, 1989 and June 21, 1989, respectively, three months and five months prior to the filing of the IAM petition and the Petition in this case. The Unions virtually ignore those decisions notwithstanding that the Third Circuit relied upon both in reaching its decision.

> field. Our reading of the Act is therefore confirmed, not rebutted, by the legislative history.

353 U.S. at 39. Thus, the *Chicago River* decision underscores the clear legislative intent to incorporate in the RLA itself a ban on strikes concerning minor disputes. Consequently, this Court in *Pittsburgh & Lake Erie,* declared:

> . . . a union may be enjoined from striking when the dispute concerns the interpretation or application of its contract and is therefore subject to compulsory arbitration.

109 S.Ct. at 2598.

The NLRA, unlike the RLA, does not contain a statutory no-strike policy nor does it require compulsory arbitration of grievances (minor disputes).

B. Under *Consolidated Rail,* A Minor Dispute Exists Where A Claim, In This Case That Sympathy Strikes Are Foreclosed, Can Arguably Be Justified By The Collective Bargaining Agreement.

As of March 3, 1989, there was a pending dispute over the scope of the no-strike clauses, which SEPTA submitted to arbitration on March 7, 1989. In determining whether that dispute constitutes a "minor dispute", the Third Circuit followed the definition articulated in *Consolidated Rail*. The Third Circuit looked for "the distinguishing feature of a minor dispute", that is, that the 'dispute may be conclusively resolved by interpreting the existing [collective bargaining] agreement.' " Pet. A. 9a quoting *Consolidated Rail*, 109 S.Ct. at 2480. The Third Circuit further noted that in *Consolidated Rail*, this Court stated:

> 'If the disputed action of one of the parties can 'arguably' be justified by the existing agreement or, in somewhat different statement, if the contention that the labor contract sanctions the disputed action

> is not 'obviously insubstantial', the controversy is a minor dispute within the exclusive province of the National Railroad Adjustment Board.'

Pet. A. 10a quoting *Consolidated Rail,* 109 S.Ct. at 2482.[7] In applying the arguably justified standard to reach the conclusion that the dispute between SEPTA and the Unions was minor, the Third Circuit determined that "[b]ased on all of the evidence", Pet. A. 18a, SEPTA met its "light" burden. Pet. A. 10a quoting *Consolidated Rail,* 109 S.Ct. at 2488. The Third Circuit held that SEPTA's position that the no-strike clauses and side letters forbid the honoring of the threatened Eastern machinists' picket line was "not so frivolous or insubstantial as to lack arguable justification". Pet. A. 18a.

In determining that there existed a minor dispute, the Third Circuit held that the district court did not have to find that the "unions' collective bargaining agreements 'clearly and unmistakably' evidenced that the unions waived their rights to engage in a sympathy strike with the Eastern employees", Pet. A. 10a, to grant SEPTA injunctive relief. Pet. A. 11a. The Third Circuit found that "borrowing the 'clear and unmistakable' standard from NLRA precedent is wholly inappropriate in the circumstance of the . . . case". *Id.* To hold otherwise, would be "fundamentally at odds with the [arguably justified] standard set forth by the Supreme Court [in *Consolidated Rail*]." Pet. A. 12a.

Relying again upon *Consolidated Rail,* the Third Circuit rejected the Unions' contention that the District Court erred in contemplating that parol evidence of the

---

7. In *Consolidated Rail,* this Court, actually quoted and adopted the standard set forth by the Third Circuit in the *Consolidated Rail* opinion below. This Court noted that "the Courts of Appeals uniformly have established some variant of the standard employed by the Third Circuit in this case. . ." 109 S.Ct. at 2482. Thus, the Third Circuit in this case was applying a standard with which it was familiar.

bargaining history could be used in interpreting the labor contracts. The Third Circuit noted:

> . . . in *Consolidated Rail* the Supreme Court recently noted that collective bargaining agreements may include implied as well as express terms and that the parties' 'practice, usage and custom is of significance in interpreting their agreement' to determine if one of the parties' position is arguably justified.

Pet. A. 13a quoting *Consolidated Rail,* 109 S.Ct. at 2485.

Accordingly, it is clear that interpretation of the no-strike provisions presents a minor dispute.

C. Under *Chicago River* And *Pittsburgh & Lake Erie,* A Union May Be Enjoined From Striking Pending Compulsory Arbitration Of A Minor Dispute.

In *Chicago River,* this Court concluded that a rail union could not resort to a strike in regard to matters pending in arbitration and that the district court "ha[d] jurisdiction and power to issue necessary injunctive orders [to enforce compliance with the requirements of the Railway Labor Act] notwithstanding the provisions of the Norris-LaGuardia Act." *Chicago River,* 353 U.S. at 42 citing *Brotherhood of R. Trainmen v. Howard,* 343 U.S. at 774.

> We hold that the Norris-LaGuardia Act cannot be read alone in matters dealing with railway labor disputes. There must be an accommodation of that statute and the Railway Labor Act so that the obvious purpose in the enactment of each is preserved. We think that the purposes of these acts are reconcilable.

Chicago River, 353 U.S at 40.

In *Brotherhood of Locomotive Engineers v. Missouri- Kansas-Texas Railroad,* 363 U.S. 528 (1960), this Court further underscored Congressional intent to

incorporate in the RLA itself a ban on strikes concerning minor disputes. There, while relying on *Chicago River,* this Court explained that an injunction of a strike relating to a minor dispute *pending arbitration* did not fall within the prohibition of the Norris-LaGuardia Act. 363 U.S. at 531. This was "because of the superseding purpose of the Railway Labor Act to establish a system of compulsory arbitration for this type of dispute, a purpose which might be frustrated if strikes could not be enjoined during the consideration of such a dispute by the Board." *Id.*

In *Pittsburgh & Lake Erie,* this Court reaffirmed that principle and the Third Circuit relied upon that reaffirmation:

> Only recently, the Supreme Court, citing *Chicago River,* declared that a 'union may be enjoined from striking when the dispute concerns the interpretation or application of its contract and is therefore subject to compulsory arbitration . . .

Pet. A. 19a quoting *Pittsburgh & Lake Erie,* 109 S.Ct. at 2598. From March 3, 1989 on, there was such a dispute. Therefore, the Unions' two arguments against application of that principle were correctly rejected.

First, the Third Circuit found that the Unions' position that "their right to engage in a sympathy strike emanate[d] from the Eastern employees' rights to engage in a secondary strike of SEPTA", Pet. A. 20a, was "analytically flawed". Pet. A. 21a. The Third Circuit did not agree with the Unions that *Burlington Northern Railroad Company v. Brotherhood of Maintenance of Way Employees, et al.,* 481 U.S. 429 (1987) required that result. The Third Circuit noted:

> It must be remembered that *the rights which this Court is called on to determine are those of the unions* and not those of the Eastern unions. The *rights* of the unions *are determined by their respective collective bargaining agreements and* must be

> *resolved in accordance with the procedures outlined in the RLA. This requires that the unions submit their dispute with SEPTA to binding arbitration. See* 45 U.S.C. §153. Moreover, having found that a minor dispute exists, the courts have the authority under *Chicago River* to maintain the integrity of the arbitration process by enjoining the unions from striking prior to the completion of the arbitration proceedings.

Pet. A. 21a (emphasis added).

Burlington Northern held that "the Railway Labor Act does not bar a union from engaging in secondary activity after the major dispute resolution procedures of the RLA have been exhausted". Pet. A. at 20a. According to the Unions, it would diminish the impact of any secondary activity by the Eastern machinists, if the Unions' members employed by SEPTA cannot honor those picket lines. Pet. A. 20a.[8] The Third Circuit

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8. The Union's position throughout this proceeding has been founded upon the erroneous hypothesis that picketing which is not honored by other employees is useless. To the contrary, as Mr. Justice Douglas pointed out in his concurring opinion in *Bakery & Pastry Drivers and Helpers, Local 802 v. Wohl,* 315 U.S. 769, 776 (1941), picketing is a combination of the "dissemination of information concerning the facts of the labor dispute", and the possibility that "the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated." Similarly, in *Thornhill v. Alabama,* 310 U.S. 88, 101 n. 18 (1939), the Court observed:

> "A picketer may: (1) Merely observe workers or customers. (2) Communicate information, e.g., that a strike is in progress, making either true, untrue or libelous statements. (3) Persuade employees or customers not to engage in relations with the employer: . . . (4) Threaten employees or customers . . .
>
> The picketing may be . . . directed to employees alone or to customers alone or to both. It may involve persons who have contracts with the employer or those who have not or both.

quoting from Hellerstein, "Picketing Legislation and the Courts" (1931), 10 *North Car. L. Rev.* 158, 186n.

There is an entire body of case law under the NLRA setting forth the distinction between "signal" picketing intended to induce

rejected the Unions' attempt to use *Burlington Northern* as "a springboard". Pet. A. 20a. Rather, the Third Circuit held that to embrace the Unions' contention that *Burlington Northern* "suggests that in all cases employees of struck secondary employers must be permitted to honor secondary strikes *notwithstanding* prohibitions against such activity in their own collective bargaining agreements", Pet. A. 21a (emphasis added), would:

> negate provisions in collective bargaining agreements that clearly prohibited employees from engaging in sympathy strikes *and would in cases such as the instant one, where a minor dispute is present, do violence* to the minor dispute resolution mechanism of the RLA and the Supreme Court's decision in *Chicago River*.

Pet. A. 21a (emphasis added). The Third Circuit also noted that in *Consolidated Rail*, "[this] Court flatly recognized that '[c]ourts may enjoin strikes arising out of minor disputes', . . . without noting any possibility of an exception, where such an injunction might dilute another union's right to engage in secondary activity." Pet. A. 22a n.9 citing 109 S.Ct. at 2481.

Although the Third Circuit recognized the general principle that employees may honor picket lines, it held that such recognition "is not inconsistent with requiring

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NOTES *(Continued)*

employees to cease working and "informational" picketing intended to advise the public, as well as employees, of the existence of a dispute and to evoke responses other than a withholding of labor. *See e.g. Miller v. United Food and Commercial Workers Union, Local 498 AFL-CIO*, 708 F.2d 467, 472 (9th Cir. 1983) and §8(b)(7)(C) of the NLRA, 29 U.S.C. §158(b)(7)(C), which permits certain picketing "unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment . . . not to perform any services."

Thus, inducing other employees to withhold their labor is only one purpose of picketing and only one of a series of responses which picketing may evoke.

those workers to be bound by other contrary legal obligations that they have undertaken". Pet. A. 22a. In making that analysis, the Third Circuit relied upon this Court's recent decision in *Trans World Airlines, Inc. v. Independent Federation of Flight Attendants,* 109 S.Ct. 1225 (1989), a case decided after *Burlington Northern* and in which this Court pointed out that:

> '[P]arties who have unsuccessfully exhausted the Railway Labor Act procedures for resolution of a major dispute may employ the full range of whatever peaceful economic power they can muster, *so long as its use conflicts with no other obligation imposed by federal law.*'

Pet. A. 22a quoting 109 S.Ct. at 1233.

In sum, relying upon *Chicago River, Burlington Northern, Consolidated Rail* and *Trans World Airlines,* the Court below correctly concluded that "the right of the Eastern employees to engage in secondary picketing at SEPTA facilities does not necessarily engender a corresponding right on the part of the unions to honor the picket lines *at this stage.*" Pet. A. 22a-23a (emphasis added).

Second, the Third Circuit rejected the Unions' argument that *Buffalo Forge Co. v. United Steelworkers of America,* 428 U.S. 397 (1976) applies under the RLA. Buffalo Forge was decided under the National Labor Relations Act which, as discussed above, contains neither the RLA's ban on strikes relating to minor disputes nor its legislated mandate for compulsory arbitration of contract interpretation matters (minor disputes).[9] The

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9. In the 5 to 4 *Buffalo Forge* decision, three Justices, Justices Brennan, Marshall and Powell joined Justice Stevens in dissenting on the ground that a federal court may enjoin a sympathy strike which violates a no-strike clause. This was, of course, in a situation not even involving the transportation industry or the RLA.

It is also specifically noteworthy that Justice Brennan dissented in *Buffalo Forge,* because, as noted in Amtrak's Brief in Opposition

Third Circuit explained that:

> We must approach this problem carefully, keeping in mind the Supreme Court's admonition not to import the NLRA 'wholesale into the railway labor area': . . Thus, 'even rough analogies must be drawn circumspectly, with due regard for the many differences between the statutory schemes'.

Pet. A. 24a-25a citing *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. at 383; and, concluded that:

> Finally, and *perhaps most importantly*, the RLA, unlike the NRLA, was enacted for the purpose of preserving industrial peace by avoiding strikes over minor disputes. (citation omitted). This Court should, therefore, not import principles established in the NLRA context into RLA cases when such action would have the effect of hindering the attainment of underlying remedial goals of the RLA.

Pet. A. 25a (emphasis added).

Other circuit court decisions since *Buffalo Forge*, like the Third Circuit, have rejected its application under the RLA. *See Long Island Railroad v. International Ass'n of Machinists*, 874 F.2d 901 (2d Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. 3297 (U.S. September 13, 1989) (No. 89-427); *Trans International Airlines, Inc. v. International Brotherhood of Teamsters*, 650 F.2d 949 (9th Cir. 1980), *cert. denied*, 449 U.S. 1110 (1981).[10] Thus, not surprisingly, the Unions cite

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NOTES *(Continued)*

at 8 n.7, it was Justice Brennan, as Circuit Justice, who refused to stay the injunction against the sympathy strike by SEPTA's employees in this case, stating it was unlikely that four justices would find the issue worthy of *certiorari*. *See* also Pet. A. 49a. Of further significance is the fact that Justice Brennan wrote the Court's opinion in *Burlington Northern*.

10. In *Trans International Airlines*, then Circuit Judge (now Justice) Kennedy expressly rejected the application of *Buffalo Forge*

no authority in support of their continued contention that the principle embodied in *Buffalo Forge* applies under the Railway Labor Act.[11]

In sum, the Third Circuit correctly relied upon an extensive body of caselaw created by this Court and gave significant weight to the paramount Congressional purpose underlying the RLA to maintain a stable transportation industry by prohibiting strikes regarding minor disputes.

II. THERE IS NO CONFLICT IN THE CIRCUITS

Contrary to the Unions' argument that there are "multiple conflicts in the decisions of the courts of appeals" . . . and a "resulting disarray in the applicable law", Pet. 6, there is no conflict among the circuits on the issue decided in this case. Rather, every circuit court that has addressed the issue has held that a sympathy strike that would arguably violate the collective bargaining agreement between an RLA carrier and its employees may be enjoined pending exhaustion of the Railway Labor Act's dispute resolution procedures. *See Southeastern Pennsylvania Transportation Authority v. Brotherhood of Railroad Signalmen*, 882 F.2d 778 (3d Cir. 1989) (decision below); *Long Island Railroad*, 874 F.2d 901, (decision below in Second Circuit petition);

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under the RLA and sustained the district court's jurisdiction to enjoin sympathy strikes in the airline industry. Judge Kennedy did so primarily because of the strength of Congressional policy to avoid disruption of the transportation business. 650 F.2d at 966-967.

11. Significantly, although the Court in *Buffalo Forge* specifically overruled numerous Court of Appeals decisions affirming injunctions against sympathy strikes under the NLRA, it omitted mention of *Northwest Airlines v. Air Line Pilots Association*, 442 F.2d 246 (8th Cir. 1970), *aff'd on rehearing*, 442 F.2d 251 (8th Cir.), *cert. denied*, 404 U.S. 871 (1971), in which the Eighth Circuit held that a sympathy strike by employees subject to the RLA was enjoinable. Indeed, the only discussion of Railway Labor Act cases in *Buffalo Forge* appears in the dissent. 428 U.S. at 419-420.

Trans International Airlines v. International Brotherhood of Teamsters, 650 F.2d 949 (9th Cir. 1980), *cert. denied,* 449 U.S. 1110 (1981); *Northwest Airlines v. Air Line Pilots Association,* 442 F.2d 246 (8th Cir. 1970), *aff'd on rehearing,* 442 F.2d 251 (8th Cir.), *cert. denied,* 404 U.S. 871 (1971); *Chicago and Illinois Midland Railway Company v. Brotherhood of Railroad Trainmen,* 315 F.2d 771 (7th Cir.), *judgment vacated as moot,* 375 U.S. 18 (1963).

Disregarding the above cited caselaw, the Unions attempt to create the illusion of a conflict by claiming that "[the Second Circuit] petition identifies two basic conflicts among the courts of appeals on important labor law questions". Pet. 6 n.8. The Unions then attempt to clarify their earlier presentation of those "conflicts" as follows:

> The first question is whether the federal courts have authority to enjoin Railway Labor Act sympathy strikes. See Pet. at 8-12. The second is whether, as a more general matter, the federal courts have jurisdiction to enter *status quo* injunctions, pending arbitration, against actions alleged to be in breach of an RLA collective bargaining agreement. *See* Pet. 12-13.

Pet. 6 n.8.

In support of the first alleged conflict, the Unions cite *Eastern Air Lines, Inc. v. Air Line Pilots Association,* No. 89-5229 (11th Cir. March 24, 1989) and *Brotherhood of Locomotive Firemen and Enginemen v. Florida East Coast Railway Co.,* 346 F.2d 673 (5th Cir. 1965). Neither decision holds that federal courts do not have authority to enjoin RLA sympathy strikes.

In *Eastern Air Lines,* the Eleventh Circuit vacated the order below denying the airline's application for an injunction prohibiting a strike by its pilots allegedly in support of the machinists' lawful strike. The pilots' union was also seeking a new contract with Eastern and

had *not* exhausted the major dispute resolution process. Although the Eleventh Circuit noted that the RLA "does not unambiguously preclude sympathy strikes", Pet. A. 51a, it did not hold that such a strike was unenjoinable and, instead, remanded to the district court to decide whether the major dispute over a new pilots' contract was the operative reason for the pilots' strike. In any event, unlike the present case, there was no no-strike clause in the pilots' agreement. *See Eastern Air Lines, Inc. v. Air Line Pilots Association,* No. 89-0446 at n.2.[12] (S.D. Fla. April 11, 1989).

Furthermore, as previously noted by the Respondents in their respective Briefs in Opposition to the Second Circuit Petition, the Eleventh Circuit opinion in *Eastern Air Lines* is unpublished. According to that Circuit's Internal Operating Procedure 36-3, which accompanies 11th Cir. R. 36-1, this treatment reflects the panel's belief that the opinion has "no precedential value." *See* Amtrak Brief in Opp. at 2 n.2; Long Island Brief in Opp. at 8. *See also Taylor v. United States,* 110 S.Ct. 265 (1989) (This Court there denied certiorari because the panel's opinion which summarily disposed of petitioner's case and created an apparent conflict was unpublished. Under the applicable Circuit Rule, such opinions "have no precedential value."); G.M. Weaver, *The Precedential Value of Unpublished Judicial Opinions,* 39 Mercer L.Rev. 477, 493 (1988) ("unpublished opinions, because of their lack of promulgation, are not precedents.").

The Unions' reliance on *Florida East Coast Railway Company* is equally misplaced. Unlike the situation in this case, there was no contractual relationship between the railroad seeking the injunction and the Port Authority employees that would have been enjoined. Nor was there a no-strike clause in the contract between the Port

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12. A copy of that opinion was attached to the Unions' Reply Brief of Appellants below.

Authority and its employees. The Fifth Circuit dissolved the injunction which had been issued by the district court because of the "realities of the factual situation...It is the [railroad] that seeks the injunction, not the Port Authority". 346 F.2d at 676. Further, the Fifth Circuit pointed out that since neither the Port Authority nor its employees had submitted the controversy to arbitration (unlike the present proceeding where SEPTA submitted the dispute to arbitration on March 7, 1989), the jurisdiction of the arbitration board was not being defeated and, therefore, an injunction would "in no way serve . . . the policy of the Railway Labor Act. . .". 346 F.2d at 676.

In support of the second alleged conflict, the Unions cite two cases. *Air Line Pilots Association v. Eastern Airlines,* 863 F.2d 891 (D.C. Cir. 1988) and *International Ass'n of Machinists v. Eastern Airlines,* 826 F.2d 1141 (1st Cir. 1988), address the issue whether an employer may be enjoined from changing working conditions pending arbitration. *Neither case involved a strike.* On that fact alone, these cases do not present a conflict with the decision below.

Indeed, in *Air Line Pilots,* where the union sought to enjoin Eastern Airlines from implementing schedule changes and furlough plans, the D.C. Circuit explained that "minor disputes – those 'arising out of the interpretation of collective-bargaining agreements' ", 863 F.2d at 895, – must be submitted to an arbitration board for resolution after negotiation has failed, and, that "[a] union cannot make a minor dispute the subject of a strike". 863 F.2d at 896.

IAM v. Eastern Airlines is equally unavailing to the Unions. There, the court stated that "[i]n disputes governed by the RLA, injunctions may be issued to prevent the violation of specific mandates in the RLA". 826 F.2d at 1146. The First Circuit dissolved the injunction because it had been issued "without reference to any statutory mandate in the RLA." *Id.* The First Circuit

noted that a court may "grant [injunctive] relief only when a union has struck and not otherwise." 826 F.2d at 1149.

CONCLUSION

For each of the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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